2006

State of Utah v. Donald Millard : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH, Appellee, vs. DONALD MILLARD, Appellant.	)	**CASE NO. 20060336 CA**

ADDENDA TO REPLY BRIEF OF APPELLANT

APPEAL FROM THIRD DISTRICT COURT
TOOELE COUNTY, STATE OF UTAH
JUDGE RANDALL SKANCHY

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IN THE THIRD JUDICIAL DISTRICT COURT

IN AND FOR TOOELE COUNTY, STATE OF UTAH

THE STATE OF UTAH, Plaintiff, vs. DONALD MILLARD, Defendant.	Case No. 041300401 Transcript of: THIRD TRIAL DAY (VOLUME III)

BEFORE THE HONORABLE RANDALL N. SKANCHY

TOOELE COUNTY COURTHOUSE
47 SOUTH MAIN STREET
TOOELE, UTAH 84074

DECEMBER 13, 2005

REPORTED BY: SUZANNE WARNICK, RDR, CSR
238-7529

MR. CUNDICK: Your Honor, the State would call Susan Hyatt.

COURT CLERK: You do solemnly swear the testimony you're about to give will be the truth, the whole truth, and nothing but the truth, so help you God?

THE WITNESS: I do.

COURT CLERK: Please be seated.

Please state and spell your name.

THE WITNESS: Susan Hyatt, S-u-s-a-n H-y-a-t-t.

COURT CLERK: Thank you.

SUSAN HYATT

called as a witness by the State, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. CUNDICK:

Q Do you know a Don Millard?

A Yes, I do.

Q How do you know Mr. Millard?

A I was married to him for about five years.

Q When you were first married -- when did that marriage occur?

A 1992.

Q And did there come a time that you became separated?

A Yes.

Q And eventually divorced?

A Yes.

Q When were you separated?

A In 1997.

Q Now, subsequent to the time of your separation, would you describe the relationship with Mr. Millard?

A Umm, well, it started off good. But I would say that he lied a lot.

Q Did it become strained.

A Yes. And it became hard to have a real relationship with him.

Q And as part of the divorce, was he ordered to do certain things?

A Yes.

Q Financial things?

A Yes.

Q What type of financial things was he ordered to do?

A He was ordered to pay child support and to pay half of the medical insurance costs and a portion of the daycare costs every month.

Q And did he do that?

A No. He paid one check when he went to court once, but he did not pay them every month. He paid them very late, and he didn't pay all of them.

Q So what type of payments did he not make?

A He has paid none of the medical insurance and none of

the daycare. And he has paid some of the child support -- in the beginning.

Q And as of September 11th, 2004, how much money did he owe you?

A Everything. It was about $20,000.

Q Now, on turning your attention to September 11th -- actually, withdrawn. You can identify Mr. Millard, correct?

A Yes, I can. He's sitting on the right side with the white sweater on.

THE COURT: The record will reflect that Susan Hyatt has identified Mr. Millard today.

MR. CUNDICK: Okay.

Q *(By Mr. Cundick)* Now, on September 11th, you recall an incident at your home that involved an assault on your person. Correct?

A Yes.

Q About what time of day did that occur, or evening.

A It was approximately 7 p.m.

Q And were your children home?

A No.

Q Were they supposed to be home?

A Yes.

Q And were your children -- had they been on a visit with Mr. Millard?

A Yes, an unscheduled one. They were supposed to be

home the previous weekend. But I was told that they were going on a cruise and they did not come home.

Q When were they supposed to get home to your house?

A After the cruise -- I forget the exact date, but I think it was a Thursday or Friday. When I called him, he would extend the date. And I forget now how many times I called to see when he would return them. I think it was three or four times that I called when they weren't there when they were supposed to be. And he would give me a new time when they were supposed to be there.

Q In fact, when was the last conversation you had with him as to when your children were supposed to be there?

A It was September the 11th, hours before. I forget the time. Maybe two hours but I have forgotten now.

Q At 7 o'clock were you waiting for the children to arrive?

A Yes.

Q And what happened at 7 o'clock or thereabouts?

A A man knocked on the door, and I answered it.

Q Hold on right there. Could you identify that person that knocked on the door?

A Yes, I could.

MR. CUNDICK: With the Court's indulgence.

(Mr. Cundick goes to the door of the courtroom.)

MR. CUNDICK: Well, we'll move on.

Q A man rang your doorbell, correct?

A Yes.

Q All right. And what happened then -- oh, excuse me. Withdrawn.

Detective Chamberlain has brought a gentleman into the courtroom. Do you see him?

A Yes.

Q Susan, is this the gentleman that attacked you that night?

A Yes, it is.

Q And when you indicate 7 o'clock and you answered the door, was this person the one at the door?

A Yes, it was.

Q And if you could just identify him for the record?

A He has a blue shirt on with a white undershirt and has handcuffs on, with dark hair.

THE COURT: The record will reflect that Miss Hyatt has identified Mr. Brinkerhoff.

MR. CUNDICK: Thank you.

Q *(By Mr. Cundick)* When you answered the door, what did this gentleman say, if anything?

A I forget exactly. But, in general, he asked about Don. He was looking for information about Don.

Q And take me through the scenario. What did he say; what did you say. And let's go through that?

A This is close to what we said. I can't remember exactly. But he said that he was a type of private investigator. He was looking for information about how to get ahold of Don. It was some kind of financial matter.

And I told him that Don should be there in the evening. And, you know, I forgot what we talked about. We talked about something about Don but I forget what at this point.

Q Okay. At some point did he indicate that he wanted to call?

A Yes. And then he reached as though he was reaching to get his cell phone, and then he said, Oh, I've forgotten my cell phone; can I use your phone to call Don?

And I had my cell phone just up the stairs. So I went up the stairs and I got my phone and I brought it to him. And I dialed Don's cell phone number. And I hit "send" on the cell phone and then I gave him the phone.

Q And did you hear what he had to say to Don?

A You know, I stepped back a little bit into my house and I don't remember. I didn't hear very clearly what was said. I remember hearing something about, he had "got the papers," or "the information." It was a very short phone call. I didn't hear everything.

Q When you say "short phone call," was it less than a minute, more than a minute?

A Probably 30 seconds, less than a minute.

Q And did he hang up?

A Yes.

Q And what did he do then?

A He lunged in my door and shut the door real quickly and pulled out a knife.

Q Where did he pull the knife from?

A I think it was his right side towards the back side of him, maybe back pocket or something.

Q Could you describe the knife?

A Yes. It was about a six- or seven-inch long hunting knife.

Q And when he retrieved the knife, what did he do with that knife?

A He moved as though to stab me in the chest or maybe my neck area.

Q Would it be fair to say that he lunged at you?

A Yes, he did.

Q And did he actually strike you?

A No. I grabbed the blade of the knife with my hand.

Q Okay. What did you do when you grabbed the blade of the knife?

A Well, I grabbed the blade, and I also grabbed at his hand on the handle, and we started struggling over the knife.

Q Okay. How long did you struggle with that knife for?

A It may have been two to five minutes. It seems like a long time, but it probably wasn't very long.

Q And what happened?

A Umm, we fought over the knife. You know, I didn't think I was going to live. At some point he got me pinned down on the floor and I couldn't move. But I still had ahold of the knife with the blade and the handle on top of his hand. But I couldn't move.

Q While you had your hand on the blade and the handle, did he touch your person, any other part of your body?

A Not yet. He did later.

Q Okay. Then tell me, when did that occur?

A We were -- I was struggling, trying to get out from underneath him. And then he pushed me down the stairs. And I tumbled and I hit the wall at the base of the stairs and he was on top of me and pinned me down again and with my arms underneath him.

Q Before you go on, you say you tumbled down the stairs. How many stairs were there?

A It's like a half a flight of stairs. Maybe eight to ten.

Q So quite a few.

A (Witness nods.)

Q That's a yes?

A Yes.

Q All right. So then you said he had you pinned against the wall?

A On the floor.

Q On the floor?

A Um-hmm. My head was in the corner by the wall.

Q Did you still have -- were you still holding onto the knife?

A I had the knife. He did not have it at all. I had the knife.

Q When you had the knife, what did he then try and do?

A He had me pinned to the floor. And he tried to break my neck. He tried to snap it back and forth a number of times, probably four or five times. And I was trying to get my arms out from underneath me because I had the knife.

And, as I was moving, he started to try and strangle me and I couldn't breathe. And I did finally get the knife out from underneath and I tried to stab him. But then he stopped and we both stood up then.

Q When you tried to stab him, did you actually touch his person with the knife?

A No.

Q But once you started to stab him, you indicated that he then stopped?

A Yes. He stood up.

Q And the struggle stopped?

A Yes. He stood up and he grabbed my hand that had the knife.

Q Okay. So you're both hanging onto the knife?

A Yes.

Q Was anything said during this time?

A I remember him. He was panting very hard. And he said that he had changed his mind; that he wanted to take my money or something to that effect. I can't remember the exact words.

Q Did you respond to that request?

A Yes. I told him my wallet was upstairs and I would show him where it was.

Q So now you're. You're both holding the knife?

A Um-hmm.

Q What conversation occurs after you're holding the knife?

A He asked for the knife.

Q What did you say?

A I told him no.

Q Why did you tell him no?

A Because I thought he might try to attack me with it again.

Q Okay. So you continued to hold onto the knife?

A Yes.

Q What did you do then?

A I suggested that we both hang onto the knife and walk up to where my wallet was, just both of us hanging onto the knife together.

Q And what did he say?

A He said okay.

Q So you walked up the stairs together?

A Yes.

Q And you walked up the eight stairs that you had fallen down.

A Yes, and then another flight of stairs.

Q And how many stairs then?

A I think it's the same number.

Q Okay. Then you walk up that flight?

A Yes.

Q And then you go where?

A My wallet was in the bedroom, which was three or four steps from there.

Q Did you go into the bedroom?

A Um-hmm.

Q Did you give him the wallet?

A I showed him where it was. And he said that he changed his mind and he said that he wanted to go. And he again asked for the knife.

Q And you said what?

A I said no.

Q And what did he do then?

A Well, he asked if he could get washed up then.

Q And you said what?

A I said yes. And he let go of the knife and he walked into my kitchen and he washed his hands.

Q And what was he washing off?

A My blood.

Q And so you held the knife while he did that?

A Yes.

Q And what happened then?

A He offered to give me his name and phone number if I would give him the knife. And I told him that there was paper and could write it down himself but I wasn't going to give him the knife.

Q Did he write down his name?

A No, he didn't.

Q What did he do?

A He wanted to leave. And he asked for the knife a number of times and I always said no. And he wanted to leave. And so I walked down the stairs ahead of him, maybe six feet ahead of him, and he followed me. And I opened the door and I walked out. And he walked out and he asked for the knife again.

Q And what did you do?

A Well, he demanded the knife actually. Excuse me. He

said he wasn't going to go until he got his knife.

Q I see.

A And I told him that I would throw the knife, and I asked him which direction should I throw it. And he pointed down the road towards the main street in Grantsville.

Before he left, he actually picked up my cell phone which he had dropped outside. And he said, Here's your cell phone. And I told him no because I didn't want to get close to him.

Q So what did you do to get your cell phone?

A You know, I don't remember. But I know he backed off because I threw the knife down the road and I walked back in the house and I locked the door.

Q After you locked the door, what did you do then?

A I called 911 and then I went around my house and made sure all the doors were locked and the windows were shut. And I got my gun just in case he came back with other people. And I waited for the police.

Q Okay. How long was it until the police arrived?

A I think it was about ten minutes. It seemed like a long time.

Q Miss Hyatt, you received injuries as a result of this attack?

A Yes, I did.

Q Can you describe those injuries?

A I had neck injuries. I couldn't move my neck for a long time. I had marks on my neck where you could see the finger marks.

Q Did you have marks and your hands?

A I had cuts on my hands from the knife.

Q I'm handing you what's been marked as State's Exhibit 15, 16 and 17, and I would ask you to review those.

A Yes.

Q Is that you in the photographs?

A Yes, it is.

Q And do those portray a fair and accurate representation of the injuries that you sustained?

A Immediately after. I had many, many bruises that surfaced after and injuries that came out later that I didn't realize the injuries that I had.

Q When were these pictures taken?

A That was that night.

Q That night?

A Yes. These were that night I went to the police station.

MR. CUNDICK: Move for the admission of Exhibits 15, 16 and 17.

MS. ISAACSON: No objection.

THE COURT: They will be received.

(Defendant's Exhibit Nos. 15, 16 & 17

were received into evidence.)

MR. CUNDICK: May I publish those, your Honor?

THE COURT: You may.

Q *(By Mr. Cundick)* Now, you'd indicated that those were the only injuries that were visible on that evening.

A Yes.

Q And you had other bruising that showed up later?

A Yes.

Q And where did that show up?

A I had a lot more on my neck that showed up. And I had bruises all up and down my arms and my legs and really big ones on my hips, I think from when I went down the stairs. And I had a serious injury to my shoulder cuff, which is a permanent injury.

Q Would you describe the injury to your shoulder, please.

A It's the bone injury where you can't lift your arm up without pain.

Q If I said the name "rotator cuff" --

A Rotator cuff, thank you. That's what they call it. Yes.

Q So you would say you had a rotator cuff injury?

A And neck injuries. The doctor said it was equivalent to getting in a car accident were the type of injuries that I had.

MR. CUNDICK: With the Court's indulgence.

Nothing further, your Honor.

CROSS EXAMINATION

BY MS. ISAACSON:

Q Ms. Hyatt, am I accurate, in the evening that you were interviewed by Detective Chamberlain, you told him that you thought that Brinkerhoff, the individual who was in your home, seemed scared when you were struggling?

A At what time? Say the last few words.

Q When he was in the hall and you were scuffling?

A Towards the end, yes.

Q He seemed scared; is that right?

A I don't know if I would say "scared." He was breathing really heavy. Whether it was tired or scared, it was one or the other.

Q Now, you mentioned that, at some point during the struggle or after the struggle, Brinkerhoff mentioned that he wanted your money. Is that right?

A Yes.

Q And is it accurate that he told you that someone had told him that you had a lot of money?

A Yes, he did say that.

Q Did he tell you at some point that he realized that he actually had the wrong person so he wanted to leave?

A Yes. The second time he changed his mind. When he

wanted to go, he said that.

Q And another thing he said to you is, I've got the wrong address because things aren't matching up here?

A He did say something like that, yes.

Q Okay. Now, at least on the night of 9-11, you didn't receive any formal medical care. You didn't go to the emergency room or anything like that; is that correct?

A The ambulance. They treated me there in the ambulance.

Q Just there at the scene?

A Yes.

Q Did you require any stitches or anything like that?

A No stitches.

Q Now, is it true, that in the fall of 2004, your information was listed in the phone book?

A Yes.

Q And your full name, address and phone number?

A Yes, as far as I know. I have to admit, I never looked.

MS. ISAACSON: Will you mark that.

May I approach, your Honor?

Q *(By Ms. Isaacson)* I'll have you take a look at the front of this. Can you tell me what date this phone book is good through?

A It says through November of 2004.

Q I'll have you take a look here on the white pages. Is that your full listing here in the white pages, "Susan Hyatt; 79 South Worthington"?

A Yes, it is.

Q And then the phone number: (435)884-6204, was that your phone number at the time?

A I think that's correct, yes.

MS. ISAACSON: I would move for admission of Defendant's Exhibit 18.

MR. CUNDICK: No objection.

THE COURT: It will be received.

(Defendant's Exhibit No. 18 was received into evidence.)

MS. ISAACSON: That's all I have.

THE COURT: Any redirect?

REDIRECT EXAMINATION

BY MR. CUNDICK:

Q So the name was listed as "Hyatt." Correct?

A Yes.

Q It was never listed as "Millard"?

A That's correct.

MR. CUNDICK: Nothing further.

THE COURT: You may step down.

Any additional witnesses today?

MR. SEARLE: Judge, pursuant to stipulation by

ADDENDUM 2

ADDENDUM 2

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	)	**AFFIDAVIT OF APPELLANT**
	)	
Plaintiff/Appellee,	)	
	)	
vs.	)	Appellate Case No. 20060336-CA
	)	
DONALD MILLARD,	)	Trial Court Case No. 041300401
	)	
Defendant/Appellant,	)	

STATE OF UTAH)
: ss.
County of Salt Lake)

DONALD MILLARD, being first duly sworn upon oath, deposes and says:

1. I have personal knowledge of the facts stated herein and if required to do so I could and would competently testify thereto.

2. I have never been arrested prior to this incident and had no criminal history. Prior to trial, I never made any inconsistent statements in this matter.

3. Throughout Wally Bugden's ("Wally") and Tara L. Isaacson's ("Tara") representations of me, I was constantly told I would be testifying in my own behalf. Prior to my arrest and conviction, I had no criminal record. I had not given prior inconsistent

statements, and it was felt by all that I needed to testify in order to counter the allegations against me. To this end, Tara prepared me to testify. Doug Maack, the private investigator hired by Wally and Tara, was also preparing me to testify. Tara went through phone records, police interviews, and prior witness statements in order to prepare him.

4. As a point of emphasis, prior to trial, at least a dozen times at a minimum, I told Wally I wanted to testify and Wally and Tara created the expectation that I would testify especially to fill in the blanks with knowledge peculiar only to me. The first time I knew I was not going to testify was Tuesday night of the trial when Wally and Tara told me I was not going to testify in my own behalf. That was it – a command that I was not going to testify. This was the night before I was going to testify. (On Wednesday of trial, Wally came out of the courtroom and told my mother Glenda Millard that she would not have to testify and could come in and see the remainder of the trial.)

5. Not only did Wally and Tara tell me I was not going to testify, they never informed me that I was the one who should make this choice. They never informed me that I had a constitutional right to testify. I was not made aware that I could have demanded the right to testify until I met with Mr. Drake who informed me I had a Constitutional right to testify at my trial.

6. In addition to telling me I was not going to testify, Tara and Wally were not interested in reviewing my notes of the trial, especially where the testimony did not make sense, contradictory, and was inconsistent with other testimony. For example, Susan Hyatt, my exwife, testified at the preliminary hearing that she struggled with Mr. Brinkerhoff, the

person who allegedly tried to kill her, for five to ten minutes while she was holding the blade of a six to eight inch knife, that the knife blade she was holding onto was being see-sawed back and forth through her hand while she was grasping it tightly, and the blade was very sharp. However, at trial, she testified this struggle with her holding the blade end of the knife occurred from only two to five minutes. She indicated that this struggle with the knife was a life or death struggle. Wally and/or Tara never pointed out this time inconsistency during the trial. Wally and/or Tara never questioned Ms. Hyatt about the wounds on her hand, that they were very minor, that she did not require stitches. Wally and Tara never called as witnesses the EMTs who were called to the scene after Mr. Brinkerhoff left in order to have them testify about their treating Ms. Hyatt's wounds, that they were very minor (as was stated in the police report).

7. Wally and Tara never called a medical expert to testify that had Ms. Hyatt's version of the attack occurred, her hand would have been severely damaged, including severed tendons, nerves, fingers, and vessels. This testimony was critical to rebut the testimony of Susan Hyatt which was a critical element of the state's case. Moreover, my trial counsel promised me after the preliminary hearing on December 21, 2004 that they would obtain a medical expert to testify that Susan's version of how she received the injuries to her hands were not consistent with the actual injuries.

8. Moreover, Ms. Hyatt testified during direct examination at trial that she had been badly bruised as a result of her struggle with Mr. Brinkerhoff, that she had torn her rotator cuff or other injury to her shoulder, that she had cut up her hand quite badly. She put

her personal medical status into issue; yet, Wally and Tara never attempted to subpoena her medical records dealing with her claimed injuries. They had ample time to investigate her injuries since she testified about them at the preliminary hearing on December 21, 2004, almost one year prior to trial. R.489. In fact, had they not been able to obtain her medical records through the criminal process, they could have attempted to do so through the civil process in my divorce case in the Third District Court.

9. With Susan's medical records in hand, my trial counsel could have impeached her testimony about these supposed injuries, demonstrating she was not telling the truth.

10. Wally and Tara allowed an edited tape of my police interview to be presented to the jury. In fact, they assisted in the editing of the tape. The part that was edited out were my statements to the police that I would be willing to take a polygraph to prove my innocence. Moreover, the police, during that same interview and toward the end, brought up the fact of the polygraph and how it was very accurate and that they would be willing to set it up. They even told me they would call me with an appointment to take it. They never did and no one was polygraphed. Yet, all mention of the polygraph was redacted from the taped interview. The polygraph itself was not an issue. My willingness to take the polygraph to proclaim and prove my innocence was the issue. Moreover, if Wally and Tara were so concerned about me not testifying, why did they allow a tape of my statements to the police to be presented to the jury? (They did so without any objection.) It seems inconsistent that they would not allow me to testify to put the recorded interview into perspective. I said nothing during this interview that was incriminating (this was even agreed to by Wally and

Tara) and protested my innocence during the whole of the interview.

11. The tape presented to the jury should have never been edited. Wally and Tara took out portions of the interview that dealt with me wanting to take a polygraph underscoring my protestations of innocence. Even Detective Chamberlain stated he would be willing to have me be polygraphed. Whether a polygraph is reliable is not the subject of this interview or tape; however, I understand that this was the reason for the redaction even though taking a polygraph was not the issue. Wally and Tara never argued that the polygraph was not the issue. What was at issue was my willingness to then and there take a polygraph to prove my innocence. It showed what I was willing to do.

12. I repeatedly requested that Wally and Tara subpoena ORS to obtain records of my child support payments to Ms. Hyatt which they promised to get and produce at trial. The state declared my alleged motive for killing my exwife was to terminate child support payments and not having to pay an existing arrearage of approximately $21,000. No child support payment records were ever produced. The only direct testimony on this issue was that of Ms. Hyatt who testified that I owed her at least $20,000 and that I hadn't paid child support for an extended period of time. This was not true and could have been rebutted by the testimony of an ORS records keeper and ORS child support records being placed into evidence. Wally and Tara never produced any evidence whatsoever refuting Ms. Hyatt's statement concerning child support. They did not ask her critical questions concerning how she arrived at the $20,000 figure, what records she had to support that figure, or to produce those records. This was critical. Had they done so, it would have been determined that she

was not telling the truth. I would have testified that the amount claimed was very inflated.

13. Wally and Tara promised me they would subpoena Susan's payment records and the ORS records. If they were unable to in the criminal court, they would do so in the civil court, since she testified to an alleged arrearage at the preliminary hearing almost one year prior to trial. They had sufficient time to prepare for this issue at trial; yet, they never did (from December 21, 2004 to the time of trial).

14. They also promised me they would subpoena Susan's medical records to see whether she told the truth in the preliminary hearing about the injuries she received. Yet, they never did so and were not prepared for the issue of her injuries and whether she was telling the truth. In fact, they should have known that her very slight injuries were very inconsistent with a life-and-death struggle over the knife when she had a hold of the blade which she described as very sharp. This unbelievable story could have easily been challenged; but, it was not even though they promised me they would investigate her statements of her injuries to see whether she was telling the truth. In fact, both defense counsel told me this was one of the weakest parts of the state's case and it would be easily proven that Susan was not attacked as she said she was. They also promised me they were investigate this issue to see what Brinkerhoff's statements were in this regard. They felt that if Brinkerhoff's version of what occurred, differed from Susan's story, this would raise enough reasonable doubt for the jury to not believe Susan, resulting in an acquital.

15. Even though defense counsel felt as stated above, they never cross-examined Susan about her injuries. They never subpoenaed her medical records. They never

subpoenaed the ORS records. They never investigated Brinkerhoff's version of the alleged assault. They never called Brinkerhoff as a rebuttal witness to rebut what Susan testified to regarding the assault. He was not in the courtroom to hear her testimony, making him vulnerable to impeachment or for her impeachment. Had they done so, I believe the jury verdict would have been different.

16. Wally did not even challenge Susan's testimony that I owed her $21,000 with contrary documentary evidence, even though the state relied on this erroneous information to show motive. Subsequent to the trial, my appeals attorney learned from David Cundick, a co-prosecutor, that this was a weak part of their case because they had no documents substantiating this amount and the state had to accept Susan's word for it. Yet, Wally and Tara did not meaningfully cross-examine her regarding her allegation that I owed her at least $20,000 in back child support. My trial counsel never asked me for any documentation to counter the statements of arrears by Susan when they first learned of it at the preliminary hearing during December 21, 2004, which I could have provided and testified to had I been called as a witness.

17. Subsequent to the trial, I learned from my appeal attorney that it could have been easy for Wally and Tara to have a writ issued demanding the presence of Davie Desvari at trial. Even though Davie Desvari was listed on Wally's and Tara's witness list, they never made any attempts to compel his presence at trial. His brother Ben Desvari knew that Davey was incarcerated at a federal facility in Safford, Arizona. R.502:314.

18. Based upon what he told me he was willing to testify to, had he been called to testify, David Desvari would have testified of his relationship with Ben Desvari and to the

fact that he was released from the Salt Lake County Jail right before Brinkerhoff went to Susan Hyatt's home. He would have testified that I allowed him to use my phone to make many calls. The Magna phone call that was so critical to the state's case was made by David Desvari. R.503:386. I never called the number in question, especially since I knew no one in Magna.

19. Based upon what he told me he was willing to testify to, had David Desvari testified, he would have stated he was anxious to see me when I got home from my vacation (on September 11, 2004) because I have construction work for him and he desperately needed it. He would have testified that when he was leaving the place he shared with Ben and his family to come to see me that evening on September 11, Ben wanted to use his cell phone so David Desvari left his phone with Ben and told him to call me and let me know he was on his way to my avenues apartment. (The phone records indicate that my phone received a phone message from Ben Desvari at about 8:51 p.m., a duration of 74 seconds, long enough to leave a short message.) His testimony would have been that he came to my apartment and found me taking luggage from my vehicle into the house. He would have testified that he asked to use my cell phone while I was doing this and took it inside my apartment. He would have testified that he called the number of 801-508-7514 in Magna to speak to Brinkerhoff (his testimony would have included that earlier in the month, he was with Brinkerhoff in the Salt Lake County ADC) about obtaining something personal. He would have testified that I never spoke to Brinkerhoff that evening when he was with me about anything to do with Susan Hyatt. His testimony would have been that I allowed him

to use my cell phone many times. He also would have testified that he and I called each other frequently. He would have testified that the three times I called his number on September 11, 2004, it was to speak to him about the construction project we were starting the 12th of September, 2004 and various ideas I had. He would have testified that I didn't call to speak to Ben Desvari but to him. He would have testified that at 6:07 p.m. on September 11, 2004, I called him while on the road returning from my vacation to tell him at about what time I would be home and if he could meet me there, at about 9:00 p.m.

20. Based upon what he told me what he was willing to testify to, David Desvari would have testified that it was impossible for me to meet with Brinkerhoff in Magna that evening during the time he was with me in my avenues apartment. Moreover, he would have testified discussing the construction project with the Pollyanna Apartments to begin the next day and that he was going to meet in during the early morning of September 12, 2004 to begin the project.

21. Based upon what he told me he was willing to testify to, David Desvari would have testified that Ben spoke to him about the trouble he was in with the Grantsville police and that Ben told him that I was not involved in any way. David would have testified that he told Ben not to implicate or finger me or he would be in big trouble with David. His words to me were he told Ben not to sell me out in order to get himself out of a jam. David also would have testified that he said this same thing to Brinkerhoff after September 11. David would also testify that he never heard me speak of wanting to kill my exwife. He would also testify that he never heard Ben or Brinkerhoff say anything about me hiring them

to kill his exwife or that they were involved in a plot to do so. He would also testify that he never heard anything from his brother, Brinkerhoff, or me about killing my exwife.

22. Equally important is that as he told me, David Desvari would have testified that Ben told him the police were really leaning on him, creating great pressure to testify against me, that Ben thought the police wanted him to say things that were not true about me in order to have me convicted of plotting to kill my exwife.

23. I feel that had David Desvari been called as a witness and testified as indicated above, such would have resulted in a jury verdict in my favor. My trial counsel rendered ineffective assistance by not calling him as a witness. I was prejudiced by this ineffectiveness. I believe that had the jury heard testimony from Ben's brother that I was not involved in a plot to kill Susan, that would have created reasonable doubt. Had David been called to testify, the jury would have known that I called his cell phone often to speak to him. The jury would have known that the very phone number the prosecutor stated was the physical tie to me being involved in the conspiracy was the number David called that night, not me. Based upon the prosecutor's closing argument and the emphasis he placed on this Magna phone number, David's testimony would have created a great deal of reasonable doubt, resulting in an acquittal. David's testimony concerning what Ben told him about pressure from the police could have made a big difference to the jury.

24. During my many interviews with defense counsel, I told them it was imperative that David Desvari be subpoenaed to trial to testify in my behalf. I also told them to what David Desvari would testify (as set forth in the previous paragraphs). They agreed he was

a necessary and material witness, especially since he would testify he was the one who made the call to 508-7514 and that when I called the Desvari cell phone, it was to speak to him. They thought it was important because his testimony would refute Brinkerhoff's statements that I contacted him on the evening of September 11, 2004. Overall, they were convinced that David Desvari had to testify. So sure were they of this that he was listed as a witness on the designation of witnesses they prepared. R.192.

25. Had I testified, I would have refuted Brinkerhoff's testimony that I met him at his sister's house in Magna. R.503:386. I would have testified I never called his sister's number on September 11, 2004. I never met with him at his sister's house, I never agreed to repair his sister's home, I never spoke to him about killing my exwife. I never said I would pay him for killing my exwife because the subject was never discussed. However, none of this came out at trial because Wally and Tara refused to allow me to testify. They never informed me that the choice was mine and that I had a constitutional right to testify. I would have testified that I never conspired with anyone to kill my exwife. She is the mother of my children. I would never have put my children through such a traumatic experience. I have never thought of killing my exwife. I would have completely refuted the testimonies of Ben Desvari, James Brinkerhoff, and Ted Anthony.

26. Moreover, I have always been a copious note taker. I could have testified from my notes regarding dates, times, and other material information that would have refuted all of the testimonies of the above-mentioned threesome. In fact, I showed these notes to my trial counsel and the fact that what was described therein was written down close in time to

of the occurrence. My trial counsel never seemed interested in using these and never investigated them. These notes would have shown that I did not make the call to Magna on September 11, 2004, that it was Davey Desvari who did. However, trial counsel never used them.

27. At the end of Tuesday's day of trial, Wally instructed me to meet him later at his office. Tara met me at the front door and said without going into the inner office, "We were presented with problems today concerning the phone records. Specifically, a call placed from your cell phone to a number in Magna." She didn't say what the number was (and neither was it made clear at trial), but did say that it was very bad and we don't know what to do. She asked whose number was that and why did you call. I said, "I'll have to check my notes." I reiterated I didn't know any number in Magna and went out to the truck to check my notes. I went to my truck and got the notes. I looked at them and discovered that on the date in question, I had entered into my notes that this was when Davie Desvari was at my apartment using my cell phone and this refreshed my recollection of what Davey Desvari told me concerning his testimony. I reminded Tara of this and told her that if they would have subpoenaed Davey Desvari, we would not be in this dilemma, because he would have testified he was the one who called the Magna number. I also reminded her that the reason why Davey Desvari was going to be called as a witness was because he was the one who called this number. I told her that since Davey had not be subpoenaed I would testify that pursuant to my notes, I not only documented the fact that Davey used my phone to call that number, I could testify I did not call that number. I begged her to let me testify. All of this fell on deaf ears and my trial counsel refused to allow me to testify. She told me it just wasn't going to happen.

28. The fact that my defense counsel had a problem with this Magna phone number

indicates they did not listen to what I said to them about David Desvari being in my apartment on the evening of September 11, 2004, used my phone to call the Magna number, that I never called the Magna phone number. My trial counsel never listened to what I said to them. It didn't seem to matter what I said to them. If what I said did not fit into their scheme of things, it did not matter. It also indicates that they didn't analyze or investigate the Sprint records that had been previously furnished Wally and Tara 10 months prior to trial. Furthermore, Wally and Tara knew about this issue of the phone call to Magna from the prosecutor's opening statement and during the second day of trial. R.502:319, 320, 386. Yet, they never questioned me about this during that day of trial or that evening. They were unprepared for the next day of trial when this Magna phone number issue again arose.

29. I went back into the office with the notes and showed Tara that this was where Davie Desvari came to my apartment and used my phone to call Magna. Again, this was in my notes. I certainly didn't have time to go to my truck, make up these notes and then walk back in to Tara's office and show them to her. Moreover, the notes I showed her were in sequence with other notes I had made on other times and dates throughout that day and this day's notes were in sequence with the notes of other days. These notes could have been used at trial since they were made contemporaneously with the actions described therein. Additionally, it would have been necessary for me to testify about these notes so their content could have been explained to the jury. However, Wally and Tara would have none of that. These notes had been shown and discussed with Tara and Wally many times and could have been used as an exhibit(s).[1]

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[1] These notes consisted of many pages and this entry was mixed in with other notes in chronological order and could not have been manufactured in the length of time it took me to go to the truck and return with them. No spaces were left between the lines so I could not have written this in during my time to the truck and back to Tara's office.

30. During June, 2007, the Tooele County Attorney provided my appeal attorney with an e-mail showing that these Spring phone records had been e-mailed to Tara and Wally by the Tooele County Attorney during February, 2005, approximately 10 months prior to trial. Therefore, the issue of the phone records should not have come as a shock to Wally and Tara had they adequately prepared. However, Tara looked at my notes and said, "Even though its written here, we're not prepared to deal with it at this juncture and I believe we have cast enough reasonable doubt anyway. You are not going to take the stand tomorrow and that's all there is to it period." I told them that had they subpoenaed David Desvari, as they told me many times they would, they would not have been in this predicament and would have been prepared because Davie Desvari would have testified that he did, in fact, use my phone many times during that period to make many calls (because he had just been released from jail) and on the day in question, he continuously used my cell phone.[2] I again told her I wanted to testify, that there were too many questions raised by the prosecution that my testimony could have answered; however, she told me that I was not going to period, no discussion. She emphasized this by saying, "Don't bring up your testifying again." Never once did she or Wally tell me that I had the right to testify and that only I could decide whether I would. I only found this out after speaking to my present appeals attorney, David Drake.

31. For at least ten months of trial preparation, Wally and Tara never discussed with me

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[2] During closing argument, Gary Searle, the prosecutor, spoke about the frequence of cell phone use during this period and interpreted such to be furthering the alleged conspiracy, that I was calling Ben rather than David Desvari. However, had Wally and Tara subpoenaed David Desvari as they promised, he would have testified that during this same period, he had just been released from the Salt Lake County Jail and made many calls to catchup for his prolonged absence in jail. Moreover, since I had hired him to work on my construction projects, this, coupled with the release from jail explanation, would have been a very plausible explanation to the erroneous assumption of the prosecutor. However, by denying me the right to testify, none of this was ever presented to the jury to rebut the prosecutor's mistaken assumption. This further underscores the fact that I needed to testify and should have been advised of my right to do so.

in any detail the phone records they received from the Tooele County Attorney. They never went over any of the phone records with me even though they had them for at least ten months and I told them about David's testimony, except to speak to the number called from my cell phone to Magna. Had they taken the time to review these records with me prior to trial, they would not have been found wanting during the trial. Moreover, had Davie Desvari been there to testify, this looming cell phone issue which arose during Tuesday of the trial could have been easily explained by Davie and Wally and Tara's excuse to prohibit me from testifying would have evaporated. Then, Davie's testimony would have been buttressed by my testimony.

32. Wally and Tara listed me as a witness who would testify. This demonstrates that I was going to testify. However, had I known that I had a constitutional right to testify, I would have even stood up in court and insisted that I testify. Again and as point of emphasis, I was never told by Wally and Tara I had the constitutional right to testify.

33. I told Tara there were a lot of things I could clear up by testifying and this phone call was no big deal because there is no way the state could refute that Davie Desvari used my phone to call that number. This whole burden rested on me because Wally and Tara had failed to subpoena him for trial. In fact, my present understanding is that Wally and Tara never sought a writ to compel David Desvari's attendance at my trial.[3] I also requested that Wally and Tara engage in thorough cross-examination in order to ferret out to whom this phone number belonged. They did not do so. Moreover, I was never advised by my trial counsel that they stipulated to my phone records coming is as evidence. Why would my trial counsel make it easier for the state to convict me?

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[3] At the time of my trial, my understanding was that David Desvari was in federal custody. Wally and Tara could have obtained a writ from the court to command his presence at trial. This they never did.

34. Another thing Davie Desvari would have testified about was the meeting at the home I was renovating in West Valley City between Ben Desvari and James Brinkerhoff (known by me to be Brad) and how they met to discuss what each would do to fix up the house, that no conspiracy to harm my exwife was never discussed because there was none. This would have refuted the prosecution's testimony that I allegedly met the co-conspirators at Granger High School to specifically discuss the conspiracy. I never met any of the three at Granger High School. I would have stated under oath that Mr. Desvari, Mr. Brinkerhoff, and I met at the house I was renovating in West Valley City and all we discussed was what was needed to be done, what supplies were to be obtained, and what each person's job was. Nothing was mentioned about killing Susan, finding a way to kill Susan, or any other thing involving Susan. This was never mentioned, even in jest, and was never spoken about by me during this time or at any other time. At this time, I asked Mr. Brinkerhoff if he could obtain some permits concerning alteration of a structure, etc., for me which he agreed to do. I asked him if he could do this while I was on vacation and I would pick these up from him after my vacation ended. At that time, I told him when I would be back from vacation.

35. Had I been called to testify, I would have honestly stated under oath that I did not take Ben Desvari to Grantsville to show him when Susan Hyatt lived. Ben Desvari spent much time in my apartment management office and often used the phone on my desk. On the desk near the phone was correspondence from Susan Hyatt with her return address thereon. It would have been very easy for him to have copied down her address. Mr. Desvari's testimony that I took him to Grantsville to show him where Susan Hyatt lived is simply false. R.502:296. I would have also testified under oath that I never spoke to Brinkerhoff about where Susan lived.

36. Had I been called to testify, I would have truthfully stated that I never knew that Ben Desvari went out to Susan Hyatt's house many times. As far as I knew, he never had a reason to go

there. He testified that he went there several times to "do his homework". When asked if he told me of this he only answered, "He knew it." When asked how I knew it, he said, "It's common sense, you know. It's all common sense." He never gave a direct answer and my trial counsel never pressed him on this. R.502:297. In fact, my trial counsel never pressed him on any matters directly dealing with the alleged conspiracy. My trial counsel never cross-examined him concerning his statements to my parents, Diane Martin, and me in the Murray park.

37. Had I been called to testify, I would have truthfully stated that on August 16, 2004, Ben Desvari never called me from a Chevron Station in Grantsville. And, contrary to what he testified to, I would have testified I was not on vacation on August 16 and could have proved it. R.502:299,307. (His answer that I was on vacation was in response to a leading question by the prosecutor, never objected to by my trial counsel, that I was on vacation.) My testimony in this regard would have again demonstrated that Ben Desvari was not telling the truth. Ben Desvari never called me later that day (he testified he couldn't remember that conversation, implying there was one which there was not – R.502:307).

38. Had I been called to testify, I would have truthfully stated that the first time I learned of Ben's foray into Grantsville was after I was arrested. Prior to that I never knew that he had been arrested in the area when he was out in a field catching lizards, snakes, and other such critters.

39. During trial, Ben testified that after Brinkerhoff allegedly called him and told him what happened at Susan's house (according to Detective Chamberlain, Brinkerhoff was at her house at approximately 8:00 to 8:15 p.m. – R.502:275), Ben testified that on

September 11, 2004 (after 8:15 p.m.), he called me a dozen times. This never happened. In fact, reviewing Ben's phone records (the cell phone he used really belonged to his brother Davey Desvari so the phone records were Davey's), that cell phone number called my number 2 times. The first call was at 8:51 p.m. and lasted 1 minute 7 seconds indicating a message was left. This call was from Ben Desvari telling me Davey Desvari told him to tell me Davey was on his way to my apartment to discuss a renovation project we were working on at the Pollyanna Apartments on the avenues in Salt Lake City. The second call was made at 9:34 p.m. Ben had called to leave a message for Davey Desvari. This call's duration was 1 minute 13 seconds. In spite of the foregoing, my trial counsel never even questioned Ben about these records. In fact, they were never even brought up during cross-examination. Had my trial counsel effectively cross-examined Mr. Desvari, it could have been demonstrated he was not telling the truth.

40. Wally and Tara simply did not prepare for trial. At the inception of their representation, they informed me that their private investigator, Doug Maack, would interview witnesses and investigate the allegations promoted by the state. They then told me that he would testify at trial in my behalf. Mr. Maack shared with me many things to which only he could testify. Yet, Wally and Tara never had him testify. Their excuse was that he would appear too biased. However, the state never had a problem with Detective Chamberlain being too biased and he was their number one witness. Even though we spoke about the phone records and my notes numerous times, Wally and Tara never investigated my notes, never did an in-depth investigation of the phone records supplied to them 10

months prior to trial, never investigated Susan Hyatt's claim that I owed her more than $20,000 in child support, never investigated or obtained any ORS records to refute this claim even though they promised me many times they would, and never investigated any of Susan Hyatt's claimed injuries or her medical records to impeach her testimony. All of this would have made her out to be a liar. As such, it was if I went to trial without any representation. In fact, with Wally's sell out of me to the judge in chambers (I was never in chambers at this time even though the record says I was – I was in the courtroom waiting for the judge and attorneys to come out), I really went to trial without counsel.

41. Had I been called to testify, I would have stated that I did have a child support arrearage; however, as I had done in the past, I purchase at minimal cost a home that renovating, renovate it, sell it for much more than I purchased it, and use whatever amount of proceeds is necessary to bring my child support and other children-related obligations current. However, since I was never allowed to testify, all the jury heard was Susan's rendition of the facts which she twisted in her favor. The conduct of my trial counsel by never advising me of my right to testify, really prejudiced me since Susan's child support testimony was totally uncontroverted.

42. Moreover, Wally and Tara never filed a motion in limine to prevent Ted Anthony from testifying about what Idrese Richardson allegedly told him about hiring a hit man or paying him to obtain a hit man or anything regarding this hearsay testimony. They had 10 months from the date of the preliminary hearing to prepare to exclude or prevent his testimony in this regard. In fact, many times I asked them what they were going to do about

his testimony at trial. They told me they would take care of it.

43. When I got released from the Tooele County Jail on October 1, 2004, I told Wally and Tara about me being in the cell next to James Brinkerhoff, a co-conspirator. When I was in Tooele County jail, I was next door to Brinkerhoff. A couple of days later, I realized that James Brinkerhoff was in the cell next to me; however, I knew him as Brad. Brad admitted his name was James and that he had lied to me about his name. Then he told me that when I saw the police reports and what James had said against me, to disregard them, that the police were pressuring him into saying what they wanted him to say, and that he would not testify to back up anything he had told the police because it was all lies and bulls--t and not to worry about anything because I had done nothing wrong, I was never involved. In spite of this, Wally and Tara failed to even cross-examine James Brinkerhoff concerning this conversation. Had they done so, I believe it would have created reasonable doubt. Without effective cross-examination, the jury only heard Brinkerhoff's side of the story. The jury had nothing else to go on. They did not have me testify about the conversation which would have most certainly cast doubt about the state's presentation. Even after I told them about this conversation, they never followed through with it or mentioned it again.

44. I also told Wally and Tara several times about meeting Ben Desvari at a park in Murray, Utah prior to me being incarcerated in the Tooele County jail during September, 2004. Ben Desvari made arrangements to meet my parents and me at this park. He really pushed to see my parents, that he had something to tell all of us. My parents, Duane and Glenda Millard, and I met him about 9:00 in the evening. Ben Desvari told all of us that he

had gotten into some trouble, that the police were pressuring him to accuse me of conspiring to kill my exwife and wanting him to testify against me in this vein, and that if he didn't, he would be prosecuted and sent to jail. He then told all of us that "Don is innocent", that "Don had nothing to do with anything. He wasn't involved in any conspiracy." He then reiterated that he wanted my parents to know about my innocence and lack of involvement.

45. My parents and I told Wally and Tara about this meeting in the Murray park. However, Wally and Tara did nothing about it. They did not seem interested. In contrast, my former attorney David Brown stated this was good evidence and even offered to have Diane wired or prepared to record any further conversations with Ben. They never cross-examined Ben Desvari about it, they never called Glenda Millard as a witness to testify about it. In fact, they never called her to testify. And, even though they called him to testify, they never questioned Duane Millard about it. Had all of us been allowed to testify about this encounter at the park, more doubt would have been created concerning the state's case. Consequently, I was prejudiced as a result since the jury was never informed of any statements Ben made contrary to his trial testimony. Again, this would have prevented such a one-sided presentation of facts without any challenge. It is one thing for Ben to lie about his prior testimony. It is another thing to see four live witnesses testifying to what Ben said on two different occasions that contradicted his trial testimony.

46. I also told Wally and Tara about the meeting at Diane Martin's home between Ben and me on prior to my parents, Diane Martin ("Diane"), and me meeting Ben in the Murray park. I told them what Ben had told Diane and me and that she would be a good

witness to testify in my behalf. Wally and Tara promised me they would have her interviewed and would call her as a witness. They never did.

47. I told Wally and Tara that Diane had called me on my land line phone at my Avenues apartment on September 11, 2004 to talk to me about the trip I had just completed. I told them the length of the conversation. She called me at about 9:30 p.m. and we talked for about an hour. I told them it was important for them to have her testify since she had heard Davey Desvari at my apartment during the evening of September 11, 2004 saying goodbye and recognizing his voice. This would corroborate the fact that I did not make the phone call to Magna.

48. Wally and Tara's performance was extremely deficient. They never kept their promises to me about how they would handle the case. Simply put, they never prepared for this case. They were overly confident.

49. There were three alleged co-conspirators – Ben Desvari, James Brinkerhoff, and Ted Anthony. Prior to the preliminary hearings which lasted almost four days, Ted Anthony was interviewed in Salt Lake City. Prior to the preliminary hearings, Ben Desvari and James Brinkerhoff were interviewed by the Grantsville Police Department at least two times apiece. Then, all three testified at the preliminary hearings. Then, all three testified at trial. Each one of these persons' testimony and/or statements were inconsistent with their prior statements. Yet, Wally and Tara never seriously challenged them on their prior inconsistent statements concerning the alleged conspiracy and never impeached them. They also failed to call witnesses they designated in order to challenge their testimonies and create

a vast quantum of reasonable doubt.

50. Conspiracy requires that there be a meeting of the minds amongst all the co-conspirators as to the terms of the conspiracy. There was never any consensus amongst the three as to what was agreed to and the amount to be paid. Yet, Wally and Tara never pursued this issue with these witnesses.

51. On page 369 of the transcript (R.502:369), Ben testified that I hired Bruce Oliver to represent his brother Davey Desvari and he felt obligated to lie for me as a result. Ben stated that he thought I had already paid a down payment (on the conspiracy) by hiring Bruce Oliver. Had Wally had me testify, I would have stated that Davey and I had multiple conversations while he was in jail and Davey instructed me to sell certain tools in order to hire Mr. Oliver. I sold these specified tools and took the proceeds from the sales and hired Bruce Oliver. I paid none of my own money to hire him. By not having me testify, the jury never heard the other side of the stories presented by the alleged co-conspirators. Had David Desvari been subpoenaed and testified, he would have stated under oath that he did instruct me to sell his tools that he specifically identified and that I took the money from the sale of these tools to Bruce Oliver to retain him for David. He would have testified that he I provided him with an itemization of the tools that I sold in order to retain counsel. Had Wally and Tara allowed me to testify, I would have produced this itemization (which I had previously showed them) in order to demonstrate that I did not use my own funds to retain counsel, that the funds came directly from the sale of David Desvari's tools, contrary to what Ben Desvari testified to. However, my trial counsel never even cross-examined Ben about

these facts and the itemization which they could have entered into evidence. R.503:369.

52. Wally Budgen, while in chambers and away from me, and without my knowledge or authorization to do so, stated that "**I think there was a conspiracy. The goal of the conspiracy was to harm Ms. Hyatt. And Mr. Desvari was enlisted for that purpose in the beginning and was unsuccessful. He continued to work with Mr. Millard and work with Mr. Brinkerhoff and Mr. Desvari continued to have a role.**" R.504:614. This was a complete sellout of me. I feel this is incompetence and ineffectiveness at its highest level. No wonder Wally and Tara failed to adequately represent me. No wonder they failed to call Glenda Millard, Idrese Richardson, Doug Maack, David Desvari, Melody Oliver, Diane Martin, and me to name a few, who could have refuted the state's witnesses and created reasonable doubt in the minds of the jury. Again, I never knew Wally said this until I was shown the trial transcript by Mr. Drake. Wally never told me he said this. I never authorized him to say this because it was not true. I should have been called to testify there was never a conspiracy that involved me. I have never desired to kill my exwife. I have never hired anyone to do such a thing. I would never place my children through such a dastardly ordeal. I never worked with Ben Desvari or James Brinkerhoff to engage in any criminal enterprise.

53. This is amazing that Wally would sell me out like this. This statement clearly indicates that I was denied my right to counsel in this trial. Wally should have been honest with me and told me he didn't believe in my innocence. His ethical responsibilities which he breached dictate that he be completely honest with me rather than appear to be something

he is not. By him being honest with me about him not believing me, this would have given me the opportunity to get other counsel. I truly believe that the only reason Wally and Tara represented me in light of the fact they did not believe me was that they had been paid approximately $137,000 (including so-called investigation fees) to represent me. They led me astray. They lied to me. They committed a fraud on me, saying one thing to me and another to the court when I was not present. They did this to induce my reliance of paying this exorbitant sum. This is why they didn't have me testify. How could Wally have made this sellout statement to the trial court and then justify not calling Glenda Millard and me as witnesses by saying we were not needed because they had created enough reasonable doubt? It is obvious that wasn't willing to do anything that would challenge his belief that I was guilty.

54. I heard Ted Anthony's testimony at the preliminary hearing, how he lied about what Idrese Richardson supposedly said to him. I found this very disturbing. Based upon my many conversations with him after hearing Ted's preliminary hearing testimony, I know that had Idrese Richardson ("Idrese") been called to testify, he would have testified that he never had any of the conversations with Ted Anthony to which Ted testified. Idrese would have testified that he never asked for a hit man for me. He did not keep calling Ted to question him about retaining a hit man. In fact, Idrese Richardson would have testified that no conspiracy to harm my exwife or anyone else was ever talked about. Idrese would have refuted all of the hearsay evidence that Wally allowed to come in without objection when Ted testified. R.503:439-450. In fact, after the preliminary hearing, I spoke to Idrese about

the conversations to which Ted testified he had with Idrese, specifically, that Ted said that Idrese called and/or spoke to him numerous times about getting a hit man for me to harm my exwife. Idrese responded, saying, "That's bulls--t. I never, ever spoke to him about any hit man. The subject never came up." I told this to Wally and Tara and told them it was imperative for them to investigate Idrese and to have him as a witness.

55. During April or May, 2005, I brought Idrese to the office of Wally and Tara. Doug Maack spoke to him alone. Tara spoke to him also. Afterward, Idrese came outside and told me again that Ted never spoke to him about a hit man and he never asked Ted to get a hit man, that everything Ted said was not true. Again, it was all bulls--t.

56. I tried to get an appointment with Wally and Tara and Idrese during November, 2005 so Idrese could be prepared to testify. However, Wally or Tara would not make the time available to speak to him or to prepare him to testify.

57. After December 2, 2005, I made several appointments for Idrese to come to Wally and Tara's office. Every appointment I made was canceled by either Wally or Tara. They never did speak to him between December 2 and December 15, 2005. I found this disconcerting in light of Wally's and Tara's December 2, 2005 letter to me about the importance of having Idrese come to their office to be interviewed. I also found this strange that they did not asses Idrese when he first came to their office in the spring, 2005. A true and correct copy of this letter is attached hereto, incorporated hereat, and marked Exhibit A.

58. Exhibit A also addresses the phone records issues. My trial counsel had these records since February, 2005. Why were they so suddenly concerned about them on the eve

of trial. This letter demonstrates that they were not prepared.

59. On December 8, 2005, I spoke for the last time to Idrese. He was still available to come in and testify and was willing to do so. As an aside, since I have been in prison, he disappeared. Mutual contacts have not heard from him since about a month after I was sent to prison.

60. I needed to be called as a witness to rebut all of the nonsensical statements of Ted. Left alone, they could be very damaging. I told this to Wally and Tara and they agreed that these statements, left alone, could be extremely harmful to me. However, in my trial preparation, they never fully prepared me to testify to rebut the preliminary hearing testimony of Ted even though I could since he lied constantly in his testimony. I knew he was very angry with me because of Melody.

61. About the time we first met, he confronted me about Melody and even though I repeatedly told him there was no romantic involvement, he told me he did not believe me. He was very angry with me when he said this. He accused me of attempting to pull the wool over his eyes. He told me he had been around too long to allow this to happen.

62. With this backdrop, it makes no sense that I would tell Ted, who was angry with me and told me so and accused me of lying to him and that he didn't trust me, that I wanted to get the name of a hit man from him in order to kill my exwife. Why would I place myself in this position with a man who hated me? Why would I give him something to hold over me? Yet, during trial, my trial counsel never effectively cross-examined him about this. In fact, over my strenuous objection while sitting at counsel table with them, they did not

make any objections to Ted's hearsay comments concerning Idrese.

63. I also told Wally and Tara about a strange call I received from Ted Anthony after I met him at the apartments I managed in September, 2004. He told me he found a hit man for me who could take care of my exwife. I told him I had no idea what he was talking about. He kept pressing this hit man theme. I again told him I had no idea what he was talking about and to get the hell off from my phone. I told him he was crazy! Ted's conversation was out of the blue and I found this to be very strange. In retrospect, I believe he was wired and the conversation was being recorded, that Ted was an agent for the police. If this is true, my response to Ted's nonsensical statements would be mitigating circumstances which obligated the prosecutor to give a copy of the recording to my attorney; however, such was never provided my attorneys and, as far as I know, my trial counsel never investigated this, never put in an additional discovery request and never contacted Detective Mitchell to see whether (1) Ted contacted Don at their request; (2) was wired or the conversation was recorded; (3) what Don said or what his response was.

64. After the preliminary hearing, I also told Wally and Tara about the confrontation Ted had with me when he accused me of having sex with Melody. I told them that Ted told me to stay away from her, that she was his girl. I also told them I had spoken to Melody who told me Ted was so angry with me and jealous that he swore to her he would get even with me, that he would set me up and take me down. I informed them that it was essential that Melody testify to this in order to establish a motive for Ted to lie during his testimony, that his testimony was part of him taking me down.

65. After the preliminary hearings, specifically Ted's testimony, my trial counsel promised me they would get the information from DMV concerning Ted's Toyota RAV4 that he said was jointly owned by his fiancé Keomi Cohn and him in order to impeach his testimony. However, they never did. I feel that this would have been a good way to impeach Ted's testimony and credibility by demonstrating he lied under oath during the preliminary hearings. They failed to investigate these facts in order to impeach Ted.

66. Bill Penrod should have been called since Ted Anthony stated he had spoken to Penrod about this case and was hoping for leniency. R.491:19-20,24. I told Wally and Tara that it was important for Bill Penrod to testify to what Ted said during the preliminary hearing about speaking to him about the case which was completely untrue. I told them I had spoken to Penrod who told me that Ted did speak to him. Penrod told me when I spoke to him that Ted bragged he would take me down. He even said to Penrod, "How can Don mess around with my girl [Melody] when he is in prison?" Penrod also told me his modus operandi was to lie about people to the police so he would get lenient treatment, that Penrod had seen him do this on past occasions. Trial counsel promised they would investigate him and have him testify at trial. Even though named on the witness list, they failed to subpoena him and have him testify.

67. After the preliminary hearing, I spoke to Idrese Richardson about Ted Anthony's testimony that Idrese had contacted him many times about getting a hit man. Idrese just scoffed at this. He told me that the subject of a hit man never came up. He told me that Ted never told him about any east coast man helping him find his car. When I told him about what Ted had said, Idrese told me this was all made up (except he used several

expletives).

68. Brinkerhoff testified he went to Susan's house hoping to meet with me to give me papers I requested. R.502:382-83. He didn't know if I would hire him; however, at the West Valley City home to be renovated, I asked him to pull some permits and get documents for me so we could begin renovation. I told him that if I didn't get these permits, I would not be able to hire him. I didn't know he went to Susan's to meet me until after I was notified by the police of his involvement in the investigation. Had I been called to testify, I would have stated this.

69. Without any of the foregoing being presented as a result of my trial counsel's ineffectiveness, I was prejudiced because all the jury heard was a very one-sided presentation of the evidence. My trial counsel did nothing to prevent this, and because they failed to make timely objections, really assisted the state in convicting me. On the other hand, had the jury heard my testimony as set forth herein, and the testimonies of Davey Desvari, Idrese Richardson, and William Penrod, as set forth herein, the one-sided presentation would have stopped and this would have influenced the jury. My counsel should have cross-examined Ben Desvari and James Brinkerhoff at length about the phone records if they had come in over objection (which my counsel did not make) in order to destroy their credibility. Since that did not occur, I have been prejudiced as a result.

70. Moreover, my counsel's failure to obtain an expert to testify about Susan's statements concerning her injuries prejudiced me. Without such and proper cross-examination, all the jury heard was her uncontroverted version of the assault.

DATED January 2, 2008.

Donald Millard
DONALD MILLARD

SUBSCRIBED AND SWORN TO before me January 2, 2008.
Residing In Salt Lake County

Lewis Wright
Notary Public

My Commission Expires:

_____

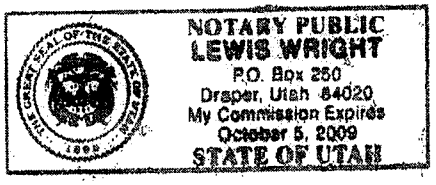

Exhibit "A"

BUGDEN & ISAACSON, LLC
ATTORNEYS · AT · LAW

523 East 2100 South
Salt Lake City, UT 84106
801-467-1700
Fax 801-467-1800

Tara L. Isaacson

December 2, 2005

PRIVILEGED
ATTORNEY / CLIENT COMMUNICATION

Donald Millard
1060 East Country Lane Road
Salt Lake City, UT 84117

COPY

Re: State v. Millard / Case No. 041300401

Dear Don:

This letter will serve to confirm the multiple conversations we have had this week and a lengthy conversation I had with your father on Friday.

As you know, Wally and I have been aggressively preparing to defend you. We are both prepared to shred the Government witnesses. However, we do not want you to either ignore or cavalierly dismiss our evidence concerns. I always think it is important to confirm, in writing, what we are thinking about the case so that there is no misunderstanding.

As we have been meeting and preparing, I have tried to emphasize our most serious issues. Specifically, we are most concerned about the phone records. I have explained to you repeatedly how those records are going to be used by the prosecutor. The timing of many of the calls are going to be used against you.

At this point, we are recommending that you testify. It is ultimately your decision, but there are too many explanations that can only come from you. We will continue to prepare you for this experience.

Another concern is Idrese – thus far, you have been unable to get him in to meet with us to assess whether to call him for trial. If he doesn't back us up, our defense is weakened. We cannot simply subpoena him for trial without assessing what he will say. It needs to be your top priority to get him in here. We can arrange to meet with him any time on Tuesday the 6th, or we will find another time. We may decide not to call him. He may be too unreliable and dangerous, but we would like to meet with him to assess his usefulness.

BUGDEN & ISAACSON

I do not want to even think about a negative outcome, but it is important that you understand the potential penalties in this case. Each charge is a First Degree Felony. With multiple counts, they can be run consecutively – one after another. The potential penalty on each count is 5 years to life. It is impossible to predict how much time you would do if you were found guilty, it is ultimately up to the Board of Pardons. The time could literally be anywhere between 5 years to life in prison. We cannot make any guarantees or even reliable estimates about how much time you would serve if we were unlucky and things do not go our way.

Our focus right now is on winning your case. I will look forward to meeting with you again on Monday to continue preparations. Prepare, prepare, prepare!

Yours truly,

Tara L. Isaacson

TLI:sw
Enclosure
cc: Duane Millard

ADDENDUM 3

ADDENDUM 3

DAVID DRAKE, USB # 0911
DAVID DRAKE, P.C.
6905 South 1300 East, # 248
Midvale, Utah 84047
Telephone: (801) 205-9049

Attorney for Appellant

IN THE UTAH COURT OF APPEALS

STATE OF UTAH, Plaintiff/Appellee, vs. DONALD MILLARD, Defendant/Appellant,	)	**SECOND AFFIDAVIT OF GLENDA MILLARD** Appellate Case No. 20060336-SC A Trial Court Case No. 041300401

STATE OF UTAH)
: ss.
County of Salt Lake)

GLENDA MILLARD, being first duly sworn upon oath, deposes and says:

1. I have personal knowledge of the facts stated herein and if required to do so I could and would competently testify thereto.

2. On or about September 11, 2004, I was notified by my husband Duane Millard ("Duane") that a meeting had been set up between Ben Desvari ("Ben"), a man listed by the state of Utah as a co-conspirator in the above-captioned case, Duane, me, and Don Millard ("Don") for that evening. The meeting was to occur at a park located at approximately 4225 South 1100 East, in Salt Lake County, State of Utah.

3. At about 9:00 PM, the meeting did occur at the park in the southwest corner near the concession stand adjacent to the edge of the baseball diamond. Initially, my husband Duane spoke alone with Ben, while I was speaking to my son Don. Moments later we joined Ben and Duane. I heard Duane ask Ben why Don was being threatened with an arrest. Ben said, "Don hasn't done anything wrong. But, the police are making me say certain things about Don and I wanted you know they are not true." Duane asked, "Why in the hell would you do that?" Ben said, "I've got myself into trouble and have to do and say certain things to get out of it."

4. Ben told us he had been at Susan Hyatt's ("Susan") house in Grantsville chasing lizards when the police apprehended him. After he had been collared while doing this, he told us that Detective Chamberlain from the Grantsville Police Department went to his home in Salt Lake County and threatened him in front of his family, that if he didn't testify the way Detective Chamberlain wanted him to against Don, that Ben would be put in jail and prosecuted. He never once told us that when he was apprehended he was near Susan's home or that he was there to threaten or harm Susan.

5. During this conversation in the park, Ben reiterated that Don had done nothing wrong and that he felt compelled to meet with us to tell us that, that Don was innocent and that he [Ben] was being coerced by Detective Chamberlain to make statements against Don.

6. Several time I told Wally Bugden ("Wally") and Tara L. Isaacson ("Tara") about this conversation with Ben in the park and the statements Ben said about Don's innocence and that he was being coerced into making accusations and untrue statements about Don. They never said much to me about any of this. By the way they conducted the

trial, it is obvious they never investigated or followed through with this information and never had me testify concerning what Ben told us during this conversation in the park. They did not cross-examine Ben about meeting my husband, Don, and me in the park and his statements to us that Don was innocent, that Don had nothing to do with what had happened to Susan, that Ben was only saying what Detective Chamberlain told him to in order to avoid being thrown in jail. If Wally and Tara had me testify about this and properly cross-examined Ben, it would appear to me as a layperson that reasonable doubt would have been established.

7. Wally and Tara prepped me to testify at trial; however, they never prepped me regarding this incident with Ben at the Murray park or the incident when Detective Chamberlain called me and threatened me, even though I previously told them about both incidents. They only prepped me regarding Don's children which were in the custody of Susan. In fact, Wally and Tara, several times, cautioned me about what I should say about Susan, to always remember she was the mother of the children and the victim in this case. (Why they used the word "victim" is beyond me since she was not a victim until Don was convicted.) They never once commented on how incredible and unbelievable her story was, especially in light of the fact that the actual injuries she received were not consistent with her testimony as to how she received these injuries. In fact, it appeared to me that with their spineless attitude, they empowered Susan to lie under oath and get away with it. They never made her account for her mendacious testimony.

8. Prior to this incident with Susan, my daughter-in-law's mother committed

suicide. As a result, Susan's and Don's children had been speaking of killing or death. Of course, Susan and Detective Chamberlain took this as if the children overheard Don or Don's family speaking of killing Susan. (Susan probably told the children that Don and his family planned on killing her.) This was never the case. The children had heard about this suicide (we had them with us on a vacation to Hawaii just prior to the incident with Susan and not long after the suicide incident) from things that were said by my family members. I was supposed to testify about this; however, Wally and Tara never had me do so. In fact, they never fully investigated my testimony regarding this.

9. Wally and Tara promised us they would obtain a methamphetamine expert to testify about the effects of continued meth use, that it affected memory, made the user paranoid, and made the user easy to manipulate by playing on his unfounded and baseless fears. The meth expert's testimony was going to address the meth addictions of Ben, Brinkerhoff, and Ted Anthony and how such could have affected their memories and testimonies. No meth expert was obtained and none testified.

10. In addition to Don and Duane informing Wally and Tara about the issue of child support payments and how Don paid these, Wally and Tara promised to subpoena the records of ORS in order to demonstrate that it was Don's history to make large, lump sum child support payments and that he did not owe what Susan claimed that he owed. However, Wally and Tara never did subpoena these records which would have refuted Susan's testimony. Moreover, had Wally and Tara had Don testify, he could have testified that he and a Salt Lake attorney had recently purchased a home to be renovated and then sold and

that Don's share of the proceeds would have then been paid to ORS as and for child support.

11. I also learned that Doug Maack, the private investigator Wally hired, was not going to testify even though he had a wealth of information concerning Don's innocence and his complete lack of involvement in the so-called conspiracy. Mr. Maack had shared in my presence the fact that Don was the "cleanest guy he had ever seen." Yet, Wally and Tara never had him testify.

12. In addition to Don informing Wally and Tara of the incident involving James Brinkerhoff at the Tooele County Jail, I also spoke to Wally and Tara about what happened when Don had been in jail in Tooele County and in a cell next to James Brinkerhoff ("Brinkerhoff"), that Brinkerhoff told Don that he was being forced by Detective Chamberlain into testifying against Don; otherwise, he would not get his complete immunity. I also informed them that Brinkerhoff had told Don that he knew Don was completely innocent. Wally and Tara did absolutely nothing with this information. They did not have Don testify concerning this conversation and they did not cross-examine Brinkerhoff about the conversation. Once again, a golden opportunity to create reasonable doubt was ignored.

13. Weeks prior to trial, Wally and Tara told me that Don would testify, that his testimony was very important, especially since he could testify to things that were only known by him or only about which he could testify in order to refute the state's case. In fact, they prepped Don several times for his trial testimony.

14. On the day Don was scheduled to testify, I learned that Wally and Tara told him he was not testifying. I could not figure why they did this. Don's testimony was critical to

his defense. He had nothing to hide. He had no criminal record. His statements to the police were very straightforward and consistent. He could have provided an explanation to the issues raised by the state's witnesses. He could have caused the jury to have reasonable doubt. Since he was not allowed to testify, the jury heard no explanation and never considered those facts which Don could have provided to establish reasonable doubt. By him not testifying, the statements of the co-conspirators were not refuted or challenged.

15. I was involved in conversations where Don told Wally and Tara that it was very essential to have Davey Desvari testify in his behalf, that Davey would testify he used Don's cell phone many times to contact his brother Ben Desvari and make other calls because he did not have a cell phone. The phone call to Magna was discussed. I heard Wally and Tara promise Don they would subpoena Davie Desvari; however, they never did and he did not testify at trial. Again, Wally and Tara missed another golden opportunity to create reasonable doubt. Ditto for my testimony had they called me to testify.

16. For more than one week prior to September 11, 2004, defendant, his children, his father, others, and I were on a cruise in the Pacific. The cruise lasted approximately 4 days. At its end, defendant and the others indicated above visited various amusement parks in Southern California for another three days. We then traveled by car from California to Salt Lake City.

17. We arrived in Salt Lake City at approximately 8:00 p.m. Defendant had decided to have his children stay overnight with my husband and me. The children were put to bed and Don helped bring in our luggage. Don then left for his home on the Avenues at

the Pollyanna Apartments. The time he left was approximately 8:40 p.m. It would take approximately 15 to 20 minutes to drive from my home to defendant's apartment.

18. I called Don at about 5 minutes to 9:00 p.m. to see whether he got home okay because he was quite tired after the drive from California. He confirmed he got home okay and told me that Davey Desvari had just called him and was on his way over to Don's apartment so they could plan their construction project on the Pollyanna Apartments.

19. At about 10 or so minutes after 9:00 p.m., I called Don on his land line phone to ask him about various items he had left at our home that I had just found. These items included his camera, laptop computer, and toiletries bag. Davey Desvari answered the land line. I asked him how he was doing and he replied okay. He then told me he was speaking to a friend on Don's cell phone and asked me to hold for a minute because Don was out to his truck getting his luggage from the trip to bring into the apartment. (I knew Davey's voice because he had done some electrical work for us on our home and I frequently spoke to him during this project.)

20. While I was waiting for Don to come back to his apartment, I heard Davey in the background speaking on the cell phone to someone and Davey was discussing getting some stuff "in order to ease [their] pain" and was speaking about how much money it would take. Evidently, money was not an issue because Davey then said he would drive to Magna to get the stuff. As he was saying goodbye, Davey said he would be leaving the avenues soon and would see the person he was speaking to in a short while.

21. Don finally came to the phone and I told him about the personal items he had

left at my home. Don told me he would pick up these items in the morning when he got the kids to take to Susan's home.

22. Don called our home on September 11, 2004 at approximately 10:35 p.m. to tell us that Susan called him and demanded that the children be returned that evening. Don told us that he was coming to our home from his apartment on the avenues in Salt Lake City to pick up the children and take them to Grantsville. He requested that my husband and I accompany the children and him. We agreed.

23. Don arrived at our home at approximately 11:00 p.m. Don called Susan's phone number from our home and left a message to the effect that he was on his way with the children.

24. We traveled to Grantsville which took us about 3/4 of an hour to get to Susan Hyatt's home.

25. During the drive, Don made several calls to Susan Hyatt's home and left messages because no one answered.

26. When we arrived at Susan's home, we were met by the police at Susan Hyatt's home. At approximately 11:45 p.m., defendant was taken to the police station and questioned for almost one hour. My husband and I waited for him and eventually picked him up at the Grantsville Police Department. Defendant called us at 12:39 a.m. to pick him up. We then traveled together straight back to Salt Lake City without any stops.

27. Early Tuesday evening after the third day of trial (December 13, 2005) my husband and I had dinner with Don. During dinner, Don informed us that after dinner he was

going to Wally's office to again prepare to testify for trial in the morning. After 9:00 p.m., I received a call from Don who was very upset. He told me he had just met with Tara and she would not allow me to testify the next day. He really felt like all was lost because the jury would never hear any contrary testimony to the testimonies of Ben, Brinkerhoff, and Ted Anthony, that their testimonies would remain unchallenged.

28. On the fourth day of trial, I was scheduled to testify. As I was waiting outside the courtroom waiting for witnesses to be called, Wally Bugden came out into the hall, walked up to me and told me that I was not going to testify. In about the same breath, he told me (my husband was standing next to me) that he and Tara had decided that Don was not going to testify (that is exactly how he put it), that they had raised enough reasonable doubt. Wally told me they would not let Don testify because it may destroy any reasonable doubt they had created with their cross-examination. Wally then walked off with my husband, evidently to discuss his testimony.

29. To this day, I cannot understand why Wally and Tara did not mount a vigorous defense, why they failed and refused to subpoena witnesses material to Don's case, why they did not allow Don to testify, why they didn't ask Duane any questions concerning meeting Ben Desvari in the Murray park, why they didn't have Diane Martin testify about her meeting Ben Desvari in her home and hearing him say that Don did nothing wrong, that Ben was being pressured by Detective Chamberlain to testify against Don, and why they did not allow me to testify to show that Brinkerhoff was lying when he said he met Don the evening of September 11, 2004 in Magna because all of Don's time had been accounted for during that evening.

30. My testimony in this regard would have shown that Brinkerhoff was not telling the truth. Don could not have met with him on September 11, 2004. First, he was traveling all day from

Southern California to Salt Lake City. Second, we all arrived at our Salt Lake City home at about 8:00 p.m. Don stayed there to put the children to bed and assist my husband and I in carrying in luggage (some of which was commingled with his). He then left at about 8:40 p.m. to go to his apartment in the avenues. I then spoke to him twice, the second time on his land line, confirming he was home. He then called me at about 10:35 and told me he was coming to get the children to go to Grantsville. He arrived at our house at about 11:00 p.m. and we then went to Grantsville, arriving there at about 11:45 p.m. Thereafter, Don met with Detective Chamberlain until about 12:39 a.m. on September 12, 2004.

31. Brinkerhoff testified that Don came to Magna to meet with him after Brinkerhoff left Susan's and went to sister's home. R.502:386. However, he never testified on direct to when, where, and how long, and Wally and Tara never even asked him these questions in their cross-examination of him. Consequently, the jury was never made aware of any of these details. Without specifics, Brinkerhoff's testimony could not be challenged. Moreover, by asking questions about details, many times such questions lead to the witness contradicting himself or saying he can't remember or whatever, anything to attack his credibility. Trial counsel never did this however.

32. Since trial counsel did not cross-examine Brinkerhoff in this fashion, it was never established how when and where Don met him. Ditto for how long. If Brinkerhoff said that Don met him late in the evening, in light of Detective Chamberlain's testimony, such a meeting would have been impossible since Don was with Chamberlain. Another answer could have been elicited through proper cross-examination to show that Brinkerhoff was lying. Don was **prejudiced** by trial counsel's lack of effective cross-examination because there was no testimony to challenge what Brinkerhoff stated.

33. Had proper cross-examination occurred, Don, Diane Martin, and I could have testified that there was no way Don could have driven all the way from Southern California to Salt Lake City, get in at 8:00 p.m., then go to his place, meet Davey Desvari, speak to me, speak to Diane Martin, and then come to my house and pick up his kids and my husband and I, travel to Grantsville, be interviewed by Detective Chamberlain and then begin to travel home with his parents at about 1:00 a.m.

34. Since I was with Don driving from Grantsville to Salt Lake City, I know for a fact that Don did not stop in Magna and see Brinkerhoff. Once we left Grantsville, we made a beeline to Salt Lake City. I would have testified to this. Moreover, trial counsel knew this but failed to investigate or act upon it. During our conversations about the phone records, I informed trial counsel what I had heard Davey Desvari say on Don's cell phone while I was waiting for Don to pick up his land line and speak to me. They heard what I said but never went any further. They failed to investigate my statements in comparison to the phone records.

35. Had the jury heard our testimonies concerning the foregoing, I am certain this would have created a great deal of reasonable doubt. However, Wally and Tara did not call any witnesses to directly challenge the testimonies of any of the co-conspirators. My testimony could have directly challenged what Ben Desvari stated about Don's innocence when he met with Don, Duane, and I in the Murray park. There were three witnesses to what Ben admitted in the park and four witnesses that he met with us in the Murray park.

ADDENDUM 4

ADDENDUM 4

DAVID DRAKE, USB # 0911
DAVID DRAKE, P.C.
6905 South 1300 East, # 248
Midvale, Utah 84047
Telephone: (801) 205-9049

Attorney for Appellant

IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	)	**AFFIDAVIT OF DIANE C. MARTIN**
	)	
Plaintiff/Appellee,	)	
	)	
vs.	)	Appellate Case No. 20060336-SC A
	)	
DONALD MILLARD,	)	Trial Court Case No. 041300401
	)	
Defendant/Appellant,	)	

STATE OF UTAH)
: ss.
County of Salt Lake)

DIANE C. MILLARD, being first duly sworn upon oath, deposes and says:

1. I have personal knowledge of the facts stated herein and if required to do so I could and would competently testify thereto.

2. Prior to Wally Bugden ("Wally") and Tara Isaacson ("Tara") entering an appearance of counsel, I told David Brown, Don Millard's former attorney, about a meeting I had with Don Millard ("Don"), Ben Desvari ("Ben"), and me in my home on or about September 15, 2004 (with the passage of time, the exact date is fuzzy). Earlier that day, Don called me and told me his name was being mentioned on the radio and he wanted to speak to me. Later that day, Don and Ben came to my house in separate cars, Ben following Don. Evidently, Don wanted to speak to Ben with me

being present to see who this friend was that had been mentioned on the radio – that Don had hired a friend to kill his exwife. They arrived separately at my house and I invited them in. Ben told both of us but speaking directly to Don, "I know that you [Don] wouldn't do nothing wrong. You didn't hire anyone to kill your exwife." I was standing next to Ben and clearly heard him say this. Ben said, "Whatever happened didn't have anything to do with you Don, you didn't have any part in this plot to kill your exwife, and you didn't do anything wrong." We spoke for a few moments. Ben seemed somewhat distracted. He then said, "As far as I know, the cops are shooting in the dark, they are only guessing." He reiterated, "You did not have anything to do with this." Had I been called to testify, I would have truthfully testified to this.

3. A day or two later after this meeting with Don and Ben in my home, I was contacted by Don and was told that Ben wanted to meet with his parents and him in a park in Murray. Don didn't want Ben to know where his parents lived so this park was suggested as a meeting place. Don wanted me to take him to the park and then pick up his parents and bring them to the park (probably because I have a small car and couldn't take all of them in it). I took Don to the park somewhat prior to 9:00 p.m. Ben was not there yet. I then went to Duane and Glenda Millard's home and picked them up. When we got to the park, Ben was there with Don. Duane and Glenda Millard exited my car and walked up to Don and Ben. They all spoke to each other for a few moments. I saw Don and Glenda Millard ("Glenda") walk away from Duane Millard ("Duane") who was speaking to Ben. Then Don and Glenda came back to Duane and Ben and all of them spoke together. This park meeting lasted about 30 minutes.

4. Later, I also told David Brown about what Ben told Don and me at my home and this meeting in the park. Because of Ben's admissions in my home that Don had nothing to do with any "plot" to harm his exwife Susan Hyatt, David Brown was extremely interested and stated that this

was compelling evidence in favor of Don. David Brown even went so far as to suggest that I get a recorder and call or meet with Ben and get him to repeat what he had said about Don's innocence so I could record this and David Brown would use it as evidence in favor of Don to show that Don was completely innocent of any involvement in any attempts to harm Susan Hyatt. I never had the opportunity to do this. Again, had I been called to testify, I would have truthfully testified about these events.

5. Shortly after the above events, David Brown was replaced by Wally Bugden ("Wally") and Tara Isaacson ("Tara"). Subsequent to taking over the case, Tara interviewed me. The interview lasted about 10 minutes. She never once asked about any conversations I had with Ben Desvari or about the meeting that occurred in the park between Don Millard, Duane Millard, Glenda Millard, and Ben Desvari. She never spoke to me about my conversation with Don at about 9:30 p.m. on September 11, 2004, that I heard Davey Desvari in Don's apartment saying goodbye to Don. I thought this was strange since I assumed Wally and Tara would have obtained David Brown's file. All Tara talked to me about was how long I had known Don, how I knew Ben, how long I had known Ben, if I ever socialized with Ben and his wife, and other minor and seemingly irrelevant things concerning Don's character. She told me at the end of the interview that if she or Wally had any questions, they would contact me. They never did and never followed through.

6. Subsequent to this conversation with Tara, I was contacted by Doug Maack who identified himself as a private investigator for Wally and Tara and would report to them any information he got from me. I met with him several times. I told him about the meeting in the park between Don, Duane, and Glenda and my involvement in taking them to the park and seeing Ben speaking to them there. I also told him about Ben and Don being in my home and what Ben said about Don being innocent, that he had nothing to do with any plot to harm Susan, that he was not

involved in any way. I even suggested that Doug Maack have me wired so I could contact Ben and record his conversations. I told him I was willing to testify for Don at trial and my testimony would include what the information I gave him concerning my personal knowledge of the admissions of Ben Desvari. I also informed him that I called Don after 9:00 p.m. on September 11, 2004 and heard Davey Desvari in the background saying goodbye to Don, that this would provide proof that Davey Desvari could have made the call to Magna. However, nothing ever came of this. There was no follow-through and I had no indication whatsoever that Wally and Tara ever further investigated my involvement in this case.

7. Even after my several conversations with Doug Maack, I was never contacted by Wally or Tara about anything that I told him. I found this to be very strange; again, indicating that Wally and Tara were unwilling to thoroughly investigate my involvement.

8. Many times prior to trial, Don told me that he was going to testify at trial. He was quite anxious to do so because he told me he had been framed and he wanted to set the record straight and tell the jury that he was not involved, that he had nothing to do with any plot or conspiracy to hurt Susan Hyatt, and that he could contradict the testimonies of James Brinkerhoff, Ben Desvari, and Ted Anthony that they gave at the preliminary hearing. He was anxious to produce all of his notes that he had taken, as a matter of course, of the events that occurred during the spring and summer of 2004. I have seen these notes prior to Don being charged with conspiracy to commit aggravated murder. I know that they were prepared at the time the events described therein occurred because I saw some of them right after they had been written (this was prior to his being charged and when there was no controversy pending). Don informed me that these notes were not used a trial. I cannot imagine why because, in my opinion, they would have exonerated Don or provided reasonable doubt concerning his innocence.

9. These many times Don told me that he was going to testify at trial, he never once showed any reluctance to testify. In fact, he was excited to testify. He was also excited about having David Desvari testify at trial. He told me he felt certain that if he and David Desvari testified that he would not be convicted. Don told me that David Desvari would testify that Don was not involved in any plot to kill his exwife. He told me that David Desvari would testify to the fact that he used Don's cell phone many times and, in fact, did so during the evening of September 11, 2004. He also told me that if I testified at trial regarding my involvement with Ben Desvari, he felt that would create the quantum of reasonable doubt to exonerate him.

10. I knew Davey Desvari quite well since he had done electrical work on my home in Midvale. He also did electrical work on a house Don and I were renovating in Midvale.

11. Based upon my relationship with Don and his family, I was aware that the family had taken a short cruise to Mexico and then visits to various theme parks in Southern California for a couple of days. I knew that Don and his family would arrive in Salt Lake City during the evening of September 11, 2007.

12. During the evening of September 11, 2004, I called Glenda Millard's home to see if Don were there. Glenda informed me that he had gone home to his apartment in the avenues in Salt Lake City. My recollection is that I called Don at his apartment (using his land line) around 9:30 p.m. He answered the phone and we talked about his trip and how much the children enjoyed being with him and their grandparents. He told me his children didn't want to go home and wanted to stay with him and his parents.

13. Don also told me that Davey Desvari and he were starting a construction project on the Pollyanna Apartments in the morning.

14. During this September 11, 2004 conversation with Don, Don told me to hold a minute

and he left the line. I heard him say goodbye to Davey. I heard Davey (I recognized his voice) reply that he would bring Monte with him to do the project in the morning and would see Don then. I also heard Davey say that they expected Don to spring for breakfast since they were coming that early.

15. I spoke to Don on his home phone until he told me he had to answer his cell phone to see who kept calling him. He left the line again and I heard him answer his cell phone. I heard him in the background say that he would not bring back the children that evening because they were already in bed at his parents' place. Don then came back to the phone and told me he had to say goodbye because Susan was demanding that he bring the children back to Grantsville that night. Based upon my recollection, we terminated our call around 10:30 p.m. on September 11, 2004. Had I been called to testify, I would have truthfully testified to these facts.

16. I was interviewed by David Drake regarding the facts in this affidavit. He informed me that my testimony would have been crucial since I could have testified at trial about what Ben Desvari told me, told Don, and that I had personally witnessed Ben Desvari meeting with Don and his parents at the Murray park. David Drake also informed me that my testimony was critical to contradict James Brinkerhoff's testimony that Don met with him in Magna after about 8:00 p.m. on the evening of September 11, 2004.

17. There is no way that Don could have been to Brinkerhoff's sister's home in Magna from the time I called since I called him on his land line at about 9:30 p.m. and the call was ended about an hour later. I believe my testimony would have been critical to challenge Brinkerhoff's credibility, demonstrating that he was not being truthful during this trial.

18. I have never heard Don say anything about wishing his wife were dead or making any similar statements. He has always spoken respectfully about her whenever she came up in our conversations. This, coupled with what Ben said to me and others, demonstrates his innocence.

DATED this 17th day of November, 2007.

DIANE C. MARTIN

SUBSCRIBED AND SWORN TO before me this 17th day of November, 2007.

Notary Public

My Commission Expires:

May 14 2012

ADDENDUM 5

ADDENDUM 5

DAVID DRAKE, USB # 0911
DAVID DRAKE, P.C.
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Midvale, Utah 84047
Telephone: (801) 205-9049

Attorney for Appellant

IN THE UTAH COURT OF APPEALS

STATE OF UTAH, Plaintiff/Appellee, vs. DONALD MILLARD, Defendant/Appellant,	)	**AFFIDAVIT OF MELODY A. OLIVER** Appellate Case No. 20060336-SCA Trial Court Case No. 041300401

STATE OF UTAH)
: ss.
County of Salt Lake)

MELODY A. OLIVER, being first duly sworn upon oath, deposes and says:

1. I have personal knowledge of the facts stated herein and if required to do so I could and would competently testify thereto.

2. I would be available to testify in the event of a retrial or a remand. What is contained in this affidavit is what I would have testified to had I been called as a witness for Don Millard at his trial during December, 2005.

3. As of December, 2005, I had known Ted Anthony ("Ted") on and off for about 13 years. During this period of time, I know that Ted's pattern and practice when he had

criminal cases pending against him, was to be a confidential informant against others so he could receive favorable treatment on the charges pending against him at the time he was a confidential informant. This was so even if he had to make up things against the person he was turning over to the police. I know this because I have heard him say things that were simply not true in order to obtain favorable treatment.

4. During July, 2004, Ted came back into my life after an eight-month absence. At the time, I was a tenant in the apartments in Midvale, Utah that Don Millard ("Don") was managing. Ted thought I have having a romantic relationship with Don and this made him extremely jealous. He accused me of this and questioned me at length about my relationship with Don. I told him that I had no romantic relationship with him. Ted obviously did not believe this. I told Ted that Don was a very good person and was a good example and influence in my life and was inspiring me to change my life. Ted did not want to hear this. He told me many times he hated Don and wanted to destroy him. I believe my statements about how good Don was/is made him more jealous of Don than he was before he spoke to me about him. In fact, Ted mentioned that he would get even with Don, no matter what it took. He told me he would testify against Don and say whatever was necessary to get him convicted because he hated him so much.

5. During 2004, Ted was arrested for various crimes. When I researched this further, I discovered that Ted had been spying on me and stalking me. I called his father and told him Ted was in jail. This is when I discovered that Ted was an informant against Don, that he was trying to get Don in trouble so he would receive favorable treatment on his

current charges and was hoping they would be dismissed because of what he planned on saying against Don.

6. I brought this up to Ted, that he was taking away a person away from me who was the only good influence in my life by attempting to get him in trouble. I was referring to Don and Ted knew this. He didn't care. In fact, I believe this made him more angry.

7. Had I been called to testify, I would have been able to testify about Don's character. He was a very good man. He was always helping others. He couldn't stand to see others in trouble. He was the most level-headed, even-tempered, forgiving person I have ever encountered. In fact, even today, I attempt to emulate his example. He went to church every Sunday. He lived his religion. He was always willing to listen and speak to people who had problems and would bring their problems to him. He would go the extra mile. He was always willing to help me.

8. Don was very devoted to his children. He always spoke of them and was a very good father to them. In the more than two years I knew Don, I never heard him say that he wished any harm to his exwife.

9. I was around Don when he had his children. He was very attentive to them and sensitive to their needs. I never heard him say anything negative about his exwife. I heard him on the phone with them. If they asked if he could come over to play, he would first ask if they cleared it with their mother. I witnessed that he was supportive of their mother when I was with Don and the children.

DATED this ____ day of October, 2007.

M. Oliver
MELODY A. OLIVER

SUBSCRIBED AND SWORN TO before me this 12 day of October, 2007.

Melia Menon
Notary Public

My Commission Expires:

12/27/2008

ADDENDUM 6

ADDENDUM 6

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Attorney for Defendant

IN THE THIRD DISTRICT COURT OF THE STATE OF UTAH
COUNTY OF TOOELE, TOOELE DEPARTMENT

STATE OF UTAH, Plaintiff, vs. DONALD MILLARD, Defendant.	)	**RULE 52(b) MOTION TO AMEND FINDINGS AND MAKE ADDITIONAL FINDINGS (VERIFIED BY DAVID DRAKE)** Trial Case No. 041300401 Appellate Case No. 20060336 Judge Mark S. Kouris

COMES NOW defendant, by and through his attorney of record, David Drake, and hereby files this Rule 52(b), U.R.Civ.P., motion and supporting memorandum to amend the findings entered by this Court on March 6, 2009 concerning the remand hearing pursuant to the remand order issued by the Utah Court of Appeals. Defendant requests that this Court amend its findings to conform to the objections contained herein, specifically that this Court find that defendant was not properly advised of his right to testify, that he did not waive his right to testify, and that defense counsel were ineffective in not informing him that he had a constitutional right to testify. Consequently, that he did not voluntarily waive his right to testify. Moreover, that this Court find that defense counsel

were not credible witnesses, especially Ms. Isaacson due to her statements contradicting David Drake's letter and the fact that she stated she did not get the letter. Moreover, defendant requests that this Court amend the findings in the manner set forth in the incorporated supporting memorandum.

This motion is timely in that Rule 52(b) requires that it be made within 10 days of the entry of the findings. The court docket indicates that the findings were signed by Judge Kouris on February 20, 2009 and were entered on March 6, 2009. In light of Rule 6(a), U.R.Civ.P., this motion and memorandum which is being filed on March 20, 2009 is timely.

DATED March 20, 2009.

DAVID DRAKE, P.C.
Attorney for Defendant

David Drake

MEMORANDUM

Finding 5, is not supported by the evidence. For example, Mr. Bugden did not manifest knowing about the exhibits supposedly manufactured by Ms. Isaacson and never testified to their content. Moreover, even though Mr. Bugden had the phone records for at least 10 months prior to trial, he admitted he never went over the phone records with defendant during that whole 10-month period. P.31, transcript.

Referring to the affidavit of David Drake, Mr. Bugden was asked, "[d]id you ever do this type of analysis when you were looking at the phone records against the backdrop of Desvari and Brinkeroff's testimonies? A. I didn't. Tara would have done that. P.42, transcript.

These examples demonstrate little or no corroboration between Mr. Bugden's testimony and Ms. Isaacson's testimony.

Finding 6 regarding the credibility of Mr. Bugden is not supported by the evidence. On December 2, 2005, Mr. Bugden sent Mr. Millard a letter, a copy of which is attached hereto, incorporated hereat, and marked Exhibit A. This letter made one little mention about Don testifying: "At this point, we are recommending that you testify. It is ultimately your decision, but there are too many explanations that can only come from you." That is all this letter stated. When Mr. Bugden testified, he was not forthright about what he stated in his letter to Mr. Millard about testifying. His testimony stated that in the December 2, 2005 letter he said, "It was ultimately your decision, and only you could make that decision." Only you can make that decision is not in the letter. And, as quoted above, it says, "but there are too many explanations that can only come from you. We will continue to prepare you for this experience." Mr. Bugden was adding language not contained in the letter. *See* p. 24, remand transcript. *See also* Exhibit 21 and objection to Finding 29.

Moreover, Mr. Bugden was arrogant and acted cute, almost as if "how dare he be challenged" attitude. With this attitude, everything he stated concerning critical issues, such as right to testify, having certain witnesses testify, etc., would all be self-serving. An example of his cuteness and arrogance is found at page 76, remand hearing transcript, "Q. Mr. Bugden, your cuteness is noted. Let's get to the issues at hand. You never sent out a letter to Don confirming that he had told you that, did you? A. No."

Finding 9 is not supported by the evidence. *See* the objection to Finding 5.

Finding 10 is not supported by the evidence. Ms. Isaacson attempted to introduce documents into evidence that had never been seen by Mr. Drake and were not contained in the files delivered to him by Ms. Isaacson.[1] Defendant's motion and memorandum to supplement the remand record demonstrates her veracity is in question. Moreover, this Court granted defendant's motion to supplement the remand record allowing defendant to place into evidence two documents demonstrating that Ms. Isaacson was not telling the truth during her testimony. Under examination, she first denied that Mr. Drake had ever requested her **whole** file. Then, when Mr. Guyon read her a letter from Mr. Drake's computer requesting the whole file several times in that letter, she denied receiving the letter. The order granting defendant's motion to supplement the remand record contained two exhibits, one, the actual letter and two, copies of bank records showing that Ms. Isaacson endorsed and negotiated a check in the amount of $506.25 which was contained in the letter she denied receiving. Obviously, she is not telling the truth. She first denied Mr. Drake requested

[1] On Tuesday, September 30, 2008, Mr. Drake drove to Tooele and met Gary Searle outside the courthouse to discuss the issue of exhibits. Mr. Drake asked Mr. Searle whether it had filed its list of exhibits. Mr. Searle told Mr. Drake that the State did not have any exhibits to be introduced into evidence. Defendant relied on that statement, obviously to his detriment. Surprise, at the hearing, Ms. Isaacson introduced several exhibits that had never been seen by Mr. Drake and had not ever been furnished to Mr. Drake.

the whole file. Then when confronted with the fact that Mr. Drake sent her a letter requesting the whole file, she denied receiving the letter. However, Ms. Isaacson cannot deny that she received the letter when she endorsed and negotiated the $506.25 check contained in that letter. These facts clearly demonstrate that Ms. Isaacson was not a completely credible witness. Attached hereto, incorporated hereat, and marked Exhibit B is defendant's memorandum filed in support of his motion to supplement the remand record.

Finding 12 is not supported by the record. Mr. Bugden did not personally subject defendant to rigorous cross-examination to prepare him for trial, citing R. at 22: 13-20. That portion of the transcript states: "Our conclusion was that Don might be a passable witness, and we did believe that there were a number of areas where Don could fill in the cracks, if he could hold up on cross examination. But always in the back of our mind, without being too sycophantic to Gary Searle, was the concern that Searle is -- he is a good lawyer and a tough cross examiner, and that Don might not hold up to Gary Searle's cross examination."

Finding 13 is not supported by the record. This finding states that "phone records corroborate this claim". That is not true and such language is not found at R.22:13-20. The phone records do not corroborate what Brinkerhoff testified to. *See* Affidavit of David Drake, filed in support of the Rule 23B motion, a copy of which is attached hereto, incorporated hereat, and marked Exhibit C. In fact, it is defendant's argument, that Mr. Bugden and Ms. Isaacson never did do an in-depth review of these phone records. Otherwise, they would have been able to see that Brinkeroff's testimony did not match the phone records. *See* ¶¶ 8-13 of the Affidavit of David Drake.

Finding 20 concerning their statements to defendant that he had an unequivocal right to testify is not supported by the record. There is no written evidence to substantiate the very self-serving

statements of Mr. Bugden and Ms. Isaacson that they advised him he had a right to testify. Finding 19 states that the defense team concedes they did not advise defendant that he had a constitutional right to testify. How, then, could they advise him of a right to testify if they failed to explain the actual right? How could defendant be expected to know where this right came from if his defense counsel failed to explain the nature of the right and the right?

Finding 29 is not supported by the evidence. The phone call where defendant told Ben Desvari that he had not arrived home was not part of the police interview. In other words, what defendant told Mr. Desvari while answering his phone call had nothing to do with the interview with Det. Chamberlain. It was during this interview that defendant received a phone call from Desvari. Only defendant's side of the conversation was recorded. Not to Det. Chamberlain but to Desvari and in an attempt to get Desvari off the phone, defendant gave him a story to terminate the call. This is contrary to Mr. Bugden's testimony. Moreover, this one-sided statement to Desvari was not made under oath. Many times things are said to other persons to get them off the phone. On the other hand, there has been the testimonies of two other credible witnesses that they spoke to Don while he was at home that evening prior to going to the Grantsville Police Station. Mr. Bugden testified that "During his interview at the police station he said he had never been home, that his luggage was still in the car, that he had not been home to his apartment yet. That's on a transcript, a transcribed statement of the defendant at the police station." That is absolutely false. Mr. Millard received a phone call from Ben Desvari while defendant was being interviewed at the police station and unbeknowst to defendant, his side of the conversation was being recorded. Defendant never made this statement to the police interviewer, as Mr. Bugden would have this Court believe. Again, this challenges Finding 6 concerning Mr. Bugden's credibility. A copy of the police interview is attached

hereto, incorporated hereat, and marked Exhibit C.

Moreover, had defense counsel properly cross-examined Brinkerhoff about the timing of the phone calls, this issue never would have arisen. How could not asking Mr. Brinkerhoff the date -- or the time, the place and who was present, when he allegedly met with Don on the evening of the supposed attack on Susan Hyatt be a strategic decision in light of the fact that defendant had just arrived back from California and met the police in Grantsville at about 11:30 p.m.? Especially in light of the fact that the alleged attack occurred after 8:00 p.m. Wally didn't even explore the possibility of an alibi for his client by failing to ask these very critical questions. R.30-31. This type of cross-examination is critical in light of the fact that Finding 38 speaks in terms of an "unexpected trial development" or as Mr. Bugden put, the testimony of Brinkerhoff caused him to have a come-to-Jesus meeting with defendant. That is how critical defense counsel viewed this phone call testimony. In light of this, the fact that Mr. Bugden failed to ask critical and simple questions of Brinkerhoff concerning the time he called defendant after 8:00 p.m. and the time defendant allegedly met him in Magna would have avoided this issue. These facts and omissions clearly contradict ¶ 5, **RULE 23B FINDINGS ON CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL.**

Finding 32 regarding the difficulty of making a note of handing a phone to a friend is not supported by the record.

Finding 33 is also unsupported by the evidence. The Court stated that defendant's affidavit is riddled with numerous inconsistencies and contradictions. That is not true. Concerning the $20,000 owed to ORS, defendant thought that he owed much less because he would repair homes, sell them, and give the proceeds to ORS toward back child support. Moreover, he was not otherwise advised by his divorce counsel. But, what is overlooked, is the fact that defense counsel promised defendant

they would subpoena ORS records and use these in trial preparation. They never did this. Had they done so and the ORS records showed the amount owed, this would not have been an issue. Had these records been obtained as promised and shown to defendant, which they were not, defendant never would have placed anything in his affidavit that contradicted the ORS records. His affidavit is a reflection of his **perception of what he owed**. Consequently, such is not a lie.

However, had defendant testified, as it was his right to do so, he would have declared his method of payment – to refurbish a home, sell it, and apply the proceeds to past due child support. In fact, he would have testified that he was in the process of remodeling a home at the time of the occurrence on September 11, 2004.

The only other seemingly inconsistency is a statement, not under oath, and not during a police interview, to Ben Desvari about having been at home and still having luggage in his vehicle. Otherwise, defendant's affidavit is not riddled with numerous inconsistencies and contradictions. **Finding 35** is not supported by the evidence. The Court manifested its doubt concerning a written journal entry handing off his phone to another. However, the affidavit of defendant demonstrates he is a copious note taker, something neither Ms. Isaacson or Mr. Bugden denied. Moreover, this record regarding the hand-off to Davey Desvari of his cell phone was directly discussed in defendant's affidavit, ¶¶ 27-29.

What is very interesting is that Mr. Bugden admitted at the remand trial (R.40) that Davey Desvari would have been a relevant witness had he known that the phone exclusively used by Ben Desvari actually belonged to Davey Desvari. This clearly demonstrates that Mr. Bugden was not prepared for trial. He never reviewed the transcripts of the preliminary hearings prior to trial. Otherwise, he would have known that the phone Ben Desvari was using belonged to Davey Desvari.

Mr. Bugden knew that for two reasons: (1) at the preliminary hearing on December 21, 2004, Ben Desvari testified that the phone he exclusively used belonged to Davey Desvari; and (2) the phone records Mr. Bugden had for 10 months included Davey Desvari's phone records – with his name on the records. Attached hereto, incorporated hereat, and marked Exhibit D is a copy of that portion of the preliminary hearing transcript.[2] Yet, Mr. Bugden never investigated this fact and never took any measures to ensure that Davey Desvari would be there for trial. (P. 15, vol. 1, preliminary hearing transcript of Ben Desvari.) Moreover, at the preliminary hearing, Ms. Isaacson was examining Ben Desvari who testified that the Kricket phone he was using belonged to Davey Desvari. *See* p.69, vol 1, preliminary hearing transcript.

Furthermore, Mr. Bugden failed to prepare for trial by overlooking the fact that Davey Desvari resided with Ben Desvari on the date of September 11 and afterward. On September 17 (p.65), Det. Chamberlain arrived at Ben Desvari's home: "Q. You were at home when the police arrived; is that correct? A. Yes. Q. Okay. So they spoke to your wife; isn't that correct? A. Like I said, I don't know. I was inside the house. I wasn't outside. Q. Okay. A. She was sitting outside with a friend. Q. The detective then spoke with your brother, David, who was living at the home. Is that right? A. When I walked outside, they were talking to David, yes." As set forth in defendant's affidavit, there are many questions that Mr. Bugden could have asked Davey, the most important being the use of Don's cell phone on September 11, 2004. ***As admitted by Mr. Bugden,***

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[2] Page 15 of the preliminary hearing transcript: "I had my brother's phone." The cell phone was registered under Ben's Desvari's brother's name – David or Davey Desvari. Page 29, "Q. Did you call him from a cell phone or a regular land phone? A. I called him from my phone. Q. When you say 'your phone' is that your home phone? A. My cell phone. I don't have a home phone. The only phone I have is just my cell phone. Q. Your brother's cell phone? A. Yes, my brother's cell phone." Page 39 of the same transcript: "Q. Did you make the call on your cell phone? A. Yes. Q. And that's the cell phone registered to your brother? A. Yes." P. 69, "Q. What is the phone number that's associated with Dave's Kricket phone that you're referring to; what is that number? A. It's 604-0408. Copies of these preliminary hearing transcript pages are included in Exhibit D.

had he known that the cell phone belonged to Davey Desvari, this would have made Davey Desvari a very relevant witness. However, since Mr. Bugden failed to adequately prepare for the trial, his performance was ineffective. This is an example of such. Moreover, since Ben Desvari admitted using Davey's cell phone during the evening of September 11, 2004 (*see* pp. 38,39,69, vol. 1 preliminary hearing transcript) Ben Desvari's testimony about him having his brother's cell phone on the evening of September 11, 2004 ***corroborates Don's testimony that Davey Desvari came to his apartment in Salt Lake City and during his sojourn there, used Don's cell phone since Davey's was being used by his brother, Ben***. Had defense counsel adequately prepared for trial, they would have known this fact. They would have called Davey Desvari as a witness even if they had to subpoena him. His testimony was critical. Moreover, Ben's preliminary hearing testimony demonstrates that defendant did not look like a deer in the headlights, he still wanted to testify. He had a truthful explanation, corroborated by Ben Desvari's preliminary hearing testimony. In light of the facts of this case, testimony of Davey Desvari would have probably created enough reasonable doubt to have obtained an acquittal. **Paragraph 6, RULE 23B FINDINGS ON CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL** states that defense counsel's performance or decisions did not prejudice defendant. In light of the foregoing, this is untrue and that finding should be omitted.

Moreover, had defense counsel adequately reviewed the preliminary hearing transcripts prior to trial in addition to the phone records they had for more than 10 months, they would have been able to impeach Ben Desvari's testimony at trial regarding the sequence and timing of calls. The attached pages of the preliminary hearing testimony of Desvari, specifically those found on pp. 38,39 of vol. 1 preliminary hearing transcript, regarding the sequence and timing of the calls on the evening of September 11, 2004 could have been easily impeached using the phone records in the possession of

defense counsel for more than 10 months. *See* ¶¶ 8-13, affidavit of David Drake.

Additionally, another corroborating fact concerning defendant's testimony is that Ben Desvari testified at the first day of the preliminary hearing that on September 17, 2004, Det. Chamberlain arrived at Ben Desvari's home and had him execute an immunity agreement wherein Ben Desvari agreed to testify against defendant. In return, he would be granted total and complete immunity. On that same evening, he met with defendant and his parents, with Diane Martin present, at a Murray park and told them that regardless of what was going to happen, he wanted them to know that Don was innocent of any conspiracy to murder Susan Hyatt. This makes this Murray park meeting absolutely critical, especially in the context of the signing of the immunity agreement. This context makes Finding 47 objectionable. This context lends enough credibility to Glenda Millard's and defendant's statements concerning this park meeting to overcome the defense team's doubts since the meeting occurred right after the immunity agreement was signed and Ben, due to his friendship with defendant and Diane Martin, would naturally want to make a statement to exonerate what would later be viewed as a betrayal. Moreover, testimony concerning such a park meeting could create reasonable doubt. The whole trial transcript shows that defense counsel did nothing to create reasonable doubt. Their advocacy was very deficient. All one has to do to see this is read Mr. Bugden's statement to Judge Skanchy in chambers. Mr. Bugden stated to the judge, at the close of the state's case-in-chief, that he felt there was a conspiracy and defendant conspired with Desvari and others. This is nothing more than a sell-out.

The point of all of this is that Mr. Bugden failed to review the preliminary hearing transcripts in order to prepare for trial. Any effective trial attorney would have done so; yet, the defense team did not. Moreover, defense counsel did nothing to investigate whether this meeting occurred. They

admitted knowing about it. Ben Desvari was never interviewed or questioned during his preliminary hearing appearance or at trial. Defense counsel had nothing to lose by questioning Ben Desvari at trial about this Murray park incident. Had he acknowledged such meeting, then Glenda Millard, Duane Millard, Diane Martin, and defendant should have been called to the stand. The very fact they failed to effectively cross-examine Ben Desvari in this regard demonstrates ineffective assistance of counsel and clearly contradicts the Court's finding in **¶ 5, RULE 23B FINDINGS ON CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL.**

Finding 36 is nothing more than an unsupported conclusion. The Court failed to articulate what was in defendant's demeanor to conclude he was not a credible witness. The Court failed to articulated what was in defendant's temperament to conclude he was not a credible witness. The Court failed to articulate what actions of defendant led it to conclude he was not a credible witness. Previously, the Court faulted defendant concerning the child support arrearage. However, since that was defendant's perception, how can that be taken as a lack of credibility. Defense counsel has much to lose by this action. If they are found ineffective, then Mr. Bugden's arrogance will be shattered. The appellate opinion will be made public and his reputation sullied. It is obvious, especially in light of Ms. Isaacson's attempt to manufacture evidence, that defense counsel has much to lose if they are adjudged ineffective. Their testimonies were too pat, too contrived; yet, they overlooked the fact that they failed to review phone records they had in their possession for more than 10 months and adequately prepare therefor and failed to review the preliminary hearing transcripts. These facts and omissions clearly contradict **¶ 5, RULE 23B FINDINGS ON CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL.**

Finding 37 is not supported by the evidence. The defense team never told defendant he had a right

to testify and they certainly never advised him of this right in any writing. Mr. Bugden never advised Don he had a constitutional right to testify. The defense team never used the word constitutional. Mr. Bugden admitted that he never told Don his decision to testify could trump Mr. Bugden's decision not to have Don testify. R.26:17-20. In fact, there was only one writing from them that said that ultimately it was his decision to testify but omitted the word "right". Moreover, Mr. Bugden and Ms. Isaacson stated they never had Don sign a waiver of his constitutional right to testify. Any competent attorney would have his client sign a waiver to avoid the very situation Mr. Bugden and Ms. Isaacson find themselves in in this appeal. The fact that the defense team did not advise defendant he had a constitutional right to testify, the fact that they did not have him sign a waiver of his right to testify, and the fact that they made no mention on the trial court record that defendant was waiving his right to testify contradicts ¶ **5, RULE 23B FINDINGS ON CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL.**

Finding 38 is not supported by the law or the record. Since defendant was never advised of his right to testify, how would he be expected to know that when his defense team told him he was not going to testify that he could not testify? The law regarding waiver of a right is very clear as is set forth in *Rowley v. Marrcrest Homeowners' Ass'n*, 656 P.2d 414, 418 (Utah 1982):

> 'A waiver is the intentional relinquishment of a known right. To constitute a waiver, there must be an existing right, benefit, or advantage; a knowledge of its existence and an intention to relinquish it. It must be distinctly made . . . .

Since the defense team never advised defendant of his constitutional right to testify, he never knew he had a right to testify or exactly what the right was or considered or the context in which the right could be asserted. *See* affidavits of defendant and David Drake. There was an existing right, benefit, or advantage by defendant to testify. Even the defense team's December 2, 2005 letter stated

the obvious: that it was essential for defendant to testify to fill in the gaps. Moreover, the testimonies of Mr. Bugden and Ms. Isaacson are all self-serving on this point and are not corroborated by their own correspondence to defendant. If they had advised defendant he had a right to testify, why wasn't the word right used in their December 2, 2005 missive? On the other hand, defendant's affidavit and his testimony are clear that he intended to testify, that he wanted to testify, and that he was never informed that he had a right to testify.

Finding 40 is not supported by the evidence. Diane Martin's affidavit is clear that she was at the Murray park and saw Ben Desvari meeting with defendant and his parents. She also stated that she met with Ben Desvari and defendant in her home right around September 17, 2004. During this meeting, she stated that Ben Desvari told her and Don that Don was innocent of any wrongdoing, that he did not engage in any conspiracy to kill his exwife. This is very important to establish reasonable doubt. Even defendant's prior attorney, David Brown, thought Ms. Martin should be wired so she could record any conversations with Ben Desvari.

Finding 44 is not supported by the evidence. Mrs. Millard's affidavit indicates what she told defense counsel.[3] Moreover, David Drake thoroughly analyzed the phone records and produced this analysis in his affidavit. *See* ¶¶ 8-13 of the Affidavit of David Drake. Based upon their cross-examination of Ben Desvari and Brinkerhoff, it is obvious defense counsel failed to review and analyze these phone records. Had they done so, they would have been able to effectively cross-

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[3] Paragraph 34 of her affidavit states: "Since I was with Don driving from Grantsville to Salt Lake City, I know for a fact that Don did not stop in Magna and see Brinkerhoff. Once we left Grantsville, we made a beeline to Salt Lake City. I would have testified to this. Moreover, trial counsel knew this but failed to investigate or act upon it. During our conversations about the phone records, I informed trial counsel what I had heard Davey Desvari say on Don's cell phone while I was waiting for Don to pick up his land line and speak to me. They heard what I said but never went any further. They failed to investigate my statements in comparison to the phone records."

examine these two state witnesses and cause reasonable doubt.

Findings 47, 48, and 49 are not supported by the evidence. *See* objection to Finding 35.

Finding 54 is not supported by the evidence. The only evidence of such finding came from the self-serving testimony of defense counsel. The defense team was concerned that the jury would believe her testimony had been bought and paid for. The same could be said of the state and its witnesses especially with their immunity agreements. Defense counsel didn't even try. Again, they never put on any evidence whatsoever to create reasonable doubt. If called, they could have asked Ms. Oliver questions similar to those asked by the state of their two witnesses to overcome their two witnesses prior inconsistent statements. There are ways to deal with this type of scenario; however, defense counsel didn't even try.

Findings 55 and 56 are not supported by the evidence, including Ms. Oliver's affidavit. These findings come from the non-corroborated statements of defense counsel. Ms. Oliver signed the affidavit admitted into evidence. She had no problem with that. She demanded no payment, made no inconsistent statements, and willingly wanted to sign the affidavit to help Don.

Finding 57 is not supported by the evidence. Again, all the Court has to do is look at Ms. Oliver's affidavit and its content to determine she was not and is not a wild card. Her statements are unequivocal.

FAILURE TO CALL DAVEY DESVARI AS A TRIAL WITNESS

All of the findings under this section are not supported by the evidence and are therefor objectionable.

Finding 60 is not supported by the evidence. *See* ¶¶ 18-24 of defendant's affidavit concerning what Davey Desvari would testify to if called. *See also* objection to Finding 35.

Finding 61 is not supported by the evidence. *See* objection to Finding 35.

Finding 62 is not supported by the evidence. Moreover, this finding is inconsistent with Mr. Bugden's statement that had he known the cell phone used by Ben Desvari belonged to his brother Davey Desvari, this would have made him a relevant witness. The state had no problem placing witnesses on the stand with shady and criminal pasts. Because of defense counsel's deficient performance, no reasonable doubt was created by the use of these witnesses. Again, defense counsel didn't even try. They didn't even try to create reasonable doubt. Every witness they could have called, named in the affidavits of defendant, Glenda Millard, Diane Martin, and Melody Oliver, would have created reasonable doubt. By not doing so, the state's witnesses' testimonies went virtually unchallenged.

Finding 63 is not supported by the evidence. *See* objection to Finding 35 and the findings under the subsection of Davey Desvari.

FAILURE TO USE A METH EXPERT AT TRIAL

Defendant objects to all findings under this section. The testimony in the affidavits of defendant and Mrs. Millard indicate that defense counsel promised them they would call a meth expert. Defendant and his mother were never notified that a meth expert would not be called. In fact, defendant's father paid for a meth expert. It is interesting to note that defense counsel did not provide anything in writing corroborating their testimonies about Dr. Verdeal. No documentary evidence was produced to show she was retained or what her opinion was. (In fact, Mr. Drake was never provided any documentation from Dr. Verdeal when he requested the whole file.) Their testimonies were all self-serving and uncorroborated, especially, during the questioning of Ben Desvari, James Brinkerhoff, and Ted Anthony at trial, defense counsel asked specific questions about how meth affects the

memory. That being the case, it makes defense counsel's testimonies concerning what Dr. Verdeal allegedly said very suspect (especially in light of Ms. Isaacson's attempts to manufacture evidence and make the denials she did about Mr. Drake's letter to her).

FAILURE TO CHALLENGE THE NATURE OF THE VICTIM'S INJURIES

Finding 74 has no support in the whole records. Defense counsel's strategy to make Susan Hyatt a heroine in effect, was a strategy to allow her to lie all she wanted about the attack and her injuries. She stated she struggled with a knife for 2 to 5 minutes, all the while holding the blade attempting to stop the thrust of a man who outweighed her by at least 80 pounds. She stated this was a life or death struggle. She also testified that the knife was very sharp. Her statements of how she received the injuries are not inconsistent with the actual very minor injuries she suffered. Again, all their strategy did was deep six defendant in order to make her a heroine, never once being concerned that their strategy allowed Ms. Hyatt to falsely testify. According to their strategy, the best way to challenge her testimony would have been to do so indirectly. That would involve a medical expert who could have testified that had her testimony been true, her hand would have been eviscerated, the nerves, tendons, and vessels would all have been severed or severely injured. Why would defense counsel allow a witness to lie under oath at their expense of their client. How can this be sound trial strategy? (Using their strategy, it would be terrible to have this defense team represent someone charged with rape, especially dealing with the victim of rape. However, the only way to get such a client acquitted is to challenge, either directly or indirectly, the alleged victim's testimony.) One other compelling fact is that Brinkerhoff testified that while going out to Ms. Hyatt's residence, he changed his mind. He stated that when he got to her house, he did not attack her, he used her phone and conversed with her insider her residence after she invited him in. He then

stated that when he got up to leave, his knife fell out of its sheath to the floor. Both of them attempted to grab it and that is when Ms. Hyatt scratched her hand. However, never once did defense counsel even question Ms. Hyatt about this. Certainly, Brinkeroff's testimony about how she scratched her hand is totally consistent with her injuries.

Finding 75 is also objectionable for the same reasons. Additionally, Brinkeroff's testimony corroborated the injuries she received. They were not self-inflicted. They resulted from Brinkeroff's knife accidently dropping to the floor and both of them attempting to pick it up.

Finding 76 is also objectionable and has no support in the record. All defense counsel's strategy did was allow Ms. Hyatt to fabricate what had happened. Certainly, her injuries were totally inconsistent with her rendition of how she received them. She even turned down an offer to be taken to the emergency room. She didn't require stitches even after she struggled with a man bent on killing her who lunged at her chest with a knife and she grabbed the blade with her hand and kept him from stabbing her even though he outweighed her by more than 80 pounds? This isn't sound trial strategy, it is deep-sixing your client. It is the result of failure to adequately prepare for trial.

Finding 78 is uncorroborated except by defense counsel's self-serving statements. The fact is that defense counsel promised defendant they would subpoena these ORS records to ascertain the exact amount of child support arrears. They never did that. **EVEN MORE COMPELLING IS THE FACT THAT IN THE DOCUMENTS GIVEN TO MR. DRAKE, EVEN AFTER HE REQUESTED THE WHOLE CRIMINAL FILE, THERE WAS NOT A COPY OF A $20,000 COURT JUDGMENT FROM MR. FRIEL OR ANY OTHER DIVORCE ATTORNEY. THEIR TESTIMONIES IN THIS REGARD ARE SUSPECT.**

RULE 23B(e) FINDINGS ON CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL:

Paragraph 1 is not supported by the evidence, based upon the foregoing.

Paragraph 2 has no basis in the record. The use of the words "without exception" means there was never an exception. This Rule 52 motion clearly demonstrates that the defense team did not thoroughly investigate the issues. For example, had they investigated the phone records, they would have been able to challenge the testimonies of Ben Desvari and Brinkerhoff by use of these records, which they did not. That is just an example. They never investigated Davey Desvari, for example, even though Mr. Bugden testified that had he known the cell phone used by Ben Desvari belonged to his brother David Desvari that would have made him a relevant witness. All of the foregoing clearly demonstrates no investigations were made and no adequate trial preparation was done.

Paragraph 3 also suffers from the same deficiencies. The defense team never put any witness on the stand, even though they had several, who could create reasonable doubt. All of the foregoing demonstrates deficient trial performance.

Paragraph 4 also suffers from the same deficiencies. Had David Desvari been allowed to testify, he would have stated he made the critical phone call from defendant's phone. Ditto for Glenda Millard and Diane Martin. Ditto for defendant testifying.

Paragraph 5 is also deficient based upon all of the foregoing. One more thing is the fact that Mr. Bugden testified he did not file a motion in limine to stop Ted Anthony from testifying to the hearsay statements of Idrese Richardson even though Ted Anthony did so at the preliminary hearing. R.77:1-9. Consequently and without objection, defense counsel allowed Mr. Anthony to make many damaging hearsay statements without one objection.

Paragraph 6 is also unsupported in the record. Defendant was severely prejudiced by all of the foregoing – he was convicted of a crime he did not commit.

Paragraph 7 is also unsupported in the record as has been discussed previously.

CONCLUSION

Based upon the foregoing, it is respectfully requested that this Court amend its findings according to the objections made herein. Also, that this Court make additional findings as requested in the motion concerning right to testify and other-related issues. The whole record indicates that such remedy be selected in order to find that overall, defense counsel's strategy was deficient and ineffective.

DATED March 20, 2009.

DAVID DRAKE, P.C.
Attorney for Defendant

David Drake

VERIFICATION

David Drake, declares under penalty of perjury of the laws of the state of Utah that he has read the foregoing Rule 52(b) motion and supporting memorandum, that the statements made therein are true based upon his personal knowledge, information, and belief.

DATED March 20, 2009.

David Drake

CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that on March 20, 2009 a true and correct copy of the foregoing Rule 52 motion and supporting memorandum were hand-delivered to the following counsel of record:

Tooele County Attorney's Office
Gordon R. Hall Courthouse
Tooele, UT 84074

And Originals Hand-delivered To:

Third District Court, Tooele Department
Gordon R. Hall Courthouse
Tooele, UT 84074

By: David Drake

ADDENDUM 7

ADDENDUM 7

IN THE UTAH COURT OF APPEALS

STATE OF UTAH, Appellee, vs. DONALD MILLARD, Appellant.	)	**CASE NO. 20060336 CA**

OPENING BRIEF OF APPELLANT

APPEAL FROM THIRD DISTRICT COURT
TOOELE COUNTY, STATE OF UTAH
JUDGE RANDALL SKANCHY

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ATTORNEYS FOR APPELLEE

Thus, Defendant did not receive effective assistance of counsel. *See Strickland v. Washington*, 466 U.S. 668, 687-94 (1984)."]

B. Failure To Investigate Facts

See **Argument I** for the lack of investigation by defense counsel of the phone records. Had defense counsel investigated these phone records, they could have effectively cross-examined Ben and Brinkerhoff re their testimonies concerning the sequence of the phone calls, creating reasonable doubt thereby.[11] However, their failure let the co-conspirators' testimonies

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[11]Detective Chamberlain testified that he arrived at Susan's home at 8:30 p.m. on September 11. R.502:272. The phone calls in question had to occur subsequent to 8:00 p.m. Brinkerhoff testified that he called Ben Desvari from his sister's house in Magna after he left Grantsville. Brinkerhoff then testified that after he got to his sister's house in Magna, he called Ben from his sister's house to tell him he did not do it. R.502:385. Ben asked Brinkerhoff to give him his phone number and Ben would call him back. Brinkerhoff then said Ben called him back and then Don called. R.502:385. The Desvari phone records indicate otherwise. Assuming that the sister's Magna phone number was 801-508-7514, the Desvari phone records indicate that a call was made to 801-604-0408 (the Desvari phone number) from 801-508-7514 at 8:54-55 p.m., with a duration of 19 seconds (obviously, no conversation took place). Then at 8:58 p.m. a phone call was made from 801-508-7514 to 801-604-0408, with a duration of 4 minutes 52 seconds. Not one call was made from the Desvari cell phone to 801-508-7514 until 10:58 p.m. and that call lasted 11 seconds (obviously, no conversation took place). Even more interesting is that Don's cell phone records indicate that a call was made from his cell phone to 801-508-7514 at 9:08 p.m. on September 11, 2004. That call lasted about 6 minutes. However, these combined records indicate that Brinkerhoff was not telling the truth. Had he spoken to Ben the second time a call was made to 801-604-0408 from this assumed Magna phone belonging to his sister (the first call from 801-508-7514 lasted only 19 seconds so obviously no conversation), then the phone records should indicate that 801-604-0408 would have called him almost right back (the phone records do not indicate this) and this call back would have occurred before Brinkerhoff received Don's call to 801-508-7514, which it did not. As stated above, there was no call back to 801-508-7514 until almost two hours after that number was called from Don's phone.

Equally interesting is the fact that the Desvari phone records indicate that a call was made from 801-604-0408 to Don's number some 36 minutes after the 801-508-7514 phone call was made to the Desvari cell phone, indicating these witnesses were not telling the truth. *See* State's trial exhibits 19, 20, 21.

ADDENDUM 8

ADDENDUM 8

IN THE THIRD JUDICIAL DISTRICT COURT, TOOELE DEPARTMENT

IN AND FOR TOOELE COUNTY, STATE OF UTAH

STATE OF UTAH, Plaintiff, vs. DONALD MILLARD, Defendant.	Case No. 041300401 Transcript of: EVIDENTIARY HEARING

BEFORE THE HONORABLE MARK S. KOURIS

GORDON R. HALL COURTHOUSE
74 SOUTH 100 EAST
TOOELE, UTAH 84074

OCTOBER 2, 2008

REPORTED BY: BRAD YOUNG
238-7531

the two of you, will today be brought out, and your right to that confidentiality is now gone. Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: I find that he knowingly and voluntarily waives that right, so that privilege is now gone. If that's the case, Mr. Bugden, would you please approach.

MR. DRAKE: One other thing, could we have the DOC just release his right hand?

THE COURT: Do you have a problem with that?

TRANSPORTATION OFFICER: No.

THE COURT: Okay, we will do that.

* * *

WALTER BUGDEN,

called as a witness by the Defendant, having been duly sworn, was examined and testified as follows:

THE COURT: Please state your name, and spell your last name for the record.

THE WITNESS: My name is Walter Bugden, B-u-g-d-e-n.

DIRECT EXAMINATION

BY MR. DRAKE:

Q. Mr. Bugden, do you have there up at the witness stand a binder, a trial book binder?

A. Yes.

Q. You are a licensed attorney in the state of Utah; is that correct?

MR. DRAKE: He is the one that brought it up.

MR. SEARLE: Is this new stuff again?

MR. DRAKE: Listen, this is from State's Exhibit 3.

THE COURT: I think we have exhausted the point. Move forward.

Q (By Mr. Drake) Did you ever get a report from this Dr. Verdeal saying what you testified to on cross, a written report?

A. Talk to Tara about that. It was Tara's witness. I don't know if we got a written report, or, again, if you are just going to be stuck with whether Tara is a liar or telling the truth.

THE COURT: Don't editorialize. Go ahead.

Q (By Mr. Drake) You made a statement about making Susan Hyatt a heroine?

A. That's right.

Q. Making her a heroine, does that give her a carte blanche license to lie under oath?

A. No, sir.

Q. Yet, you never did anything to challenge her testimony, did you?

A. Because I believed her testimony was credible and corroborated by the witnesses.

Q. It wasn't corroborated by Brinkerhoff, because Brinkerhoff on the second day of trial said he never attacked

her, and he said at a prelim he never attacked her.

A. That's two, three questions. I don't agree with your interpretation.

Q. Have you seen what I filed with the Court of Appeals?

A. No, I haven't.

Q. Did you know that I took her deposition?

THE COURT: We are off the track again. Where are you headed?

MR. DRAKE: I am going back. I am bringing this back.

THE WITNESS: I haven't seen it.

Q (By Mr. Drake) How much did Brinkerhoff outweigh Susan Hyatt?

A. He is a big man, bigger than you.

Q. So let's say her testimony was he lunged at her, lunged at her with a knife right to her chest. She grabbed the knife with the blade, with a hand, and struggled with him in a life-and-death struggle for two to five minutes. And, yet, that would have eviscerated her hand, wouldn't it have?

A. I don't know that.

Q. Well, you never investigated it, then, did you? Yes or no?

A. Did not investigate whether or not her hand would have been eviscerated.

Q. She also testified about her medical injuries at the

prelim, and then she changed those medical injuries and expanded on them at the trial. Did you ever attempt to subpoena her medical injuries after the prelim -- excuse me -- her medical files after the prelim?

A. I did not.

Q. Did you question Mr. Brinkerhoff, or did Tara?

A. No, Brinkerhoff was all mine.

Q. Now, were you aware that Don told Tara during his testimony about the corroborating witnesses that he had, about where he was on the 11th of September, 2005?

A. You will have to ask Tara that. But Tara never communicated that to me, and I don't believe it happened.

Q. Were you aware that Don said, told Tara that there was no way he was out to Magna meeting with Brinkerhoff on that day?

A. I think you should ask Ms. Isaacson that.

Q. Your answer is, no, you are not aware of it?

A. I am not aware of it.

Q. You never really investigated Glenda, did you, as far as what she knew that would be relevant to the defense of Don?

A. I don't think that's true. We met with the parents, explained our theory of the case, asked them for whatever ideas they had, whatever factual information they had, that might be helpful. Some of it we believed would be helpful, some of it we believed would not be helpful. That had to do with the

going to call Ms. Isaacson.

THE COURT: We will make arrangements, then, for the defendant to spend -- I guess you will call the defendant after that?

MR. DRAKE: Yes, your Honor.

THE COURT: If that's the case, given the short personnel at the prison, I guess we will make arrangements for Mr. Millard to spend the night tonight here at our comfortable hotel, and then they will be able to come pick him up tomorrow or Monday. We will prepare the court order so I can make sure that happens.

MR. DRAKE: Just one question, with Mr. Bugden remaining in the courtroom, that means that he would be unavailable to be re-called, correct?

THE COURT: That's correct.

* * *

TARA ISAACSON,

called as a witness by the State, having been duly sworn, was examined and testified as follows:

THE COURT: Please state your name, and spell your last name for the record.

THE WITNESS: Tara Isaacson, I-s-a-a-c-s-o-n.

DIRECT EXAMINATION

BY MR. SEARLE:

Q. Ms. Isaacson, are you a member of the Utah State Bar?

A. No.

Q. Diane never mentioned anything like that to you?

A. No, and neither did the parents mention that she was there.

Q. Have you read the affidavits?

A. I have.

Q. In regard to the affidavits which you have read, did --

MR. GUYON: You mean the affidavit of --

Q (By Mr. Searle) Let me finish. In relation to Diane Martin, Melody Oliver, and Glenda Millard, you have read those three affidavits?

A. Many times.

Q. Did you ever before trial, up to the day trial started, did any of those three individuals ever tell you about any phone calls made to the defendant at his home?

A. I didn't hear it during the trial even. I didn't hear it before the trial. I didn't hear it at the trial. I didn't read it until I saw it in the affidavits.

MR. SEARLE: All right, thank you.

THE COURT: All right, Counsel?

* * *

CROSS EXAMINATION

BY MR. GUYON:

Q. Ms. Isaacson, your name is Swedish, isn't it?

or anyone in his family. And that was well before trial.

Can I ask someone for water? Is that an option?

Q. It could be. I am going to sacrifice this. Ms. Isaacson, I would like to read from a letter to you from David Drake, concerning your testimony about what he had asked for, and see if you recall this. I only have one copy, and it is an electronic one.

MR. DRAKE: I do have a printer, your Honor.

THE COURT: That's okay, just see if it refreshes your recollection.

Q (By Mr. Guyon) "Dear Tara: I received a copy of your September 7, 2006 statement from Don Millard. Needless to say, the amount of your statement was disconcerting since some of your billing entries are subject to question. I can understand the amount of time in your first entry to review the files for appeal in order to identify documents for me to organize and index. However, your billing entry implies I did not receive the whole file, only an edited version. Since I am doing the appeal for Don Millard, and as I requested from you during our initial conversation I want copies of your whole," in large black letters, "file, not the documents you deem are necessary for the appeal. It is necessary that I receive all documents in order to frame the issues I deem are relevant to the appeal. Have I received your whole," again in large black letters, "file? Please fax me the answer to this inquiry as soon as

possible. I do thank you for your cooperation to date." Do you recall getting that letter?

A. I don't. I may have. I don't.

Q. You would agree that that request, if it had been sent, would also include Exhibits 5 and 6, would you not?

A. Yes, I'm sure they were part of the file.

Q. Now, one of the things I heard you testify about, or at least I thought I heard you testify, had to do with the transcript of Mr. Millard's -- of the telephone interview that involved Detective Chamberlain and Don Millard.

A. Are you talking about the telephone interview or the interview at the police department?

Q. I'm sorry, I think it is a video. It is not the telephone interview. But you know what I am talking about, right, wherein Mr. Millard said he had -- it is on page 25, "I got to check my notes and see if he left a telephone number, yeah, last I checked it, too, yeah. I am trying to get home. I haven't even made it to my place yet, just my parents'. I have all my luggage in the back of my truck." That's the thing you were testifying earlier in response to questions from Mr. Searle, correct?

A. Correct.

Q. That's one of the things that gave you heartburn, because you said you understood that to be an inconsistent statement of Don, correct?

A. It is not part of any of my practice previously, but it absolutely would have been a simple thing to do.

Q. But it really would have been simple, wouldn't it?

THE COURT: She has answered that. Let's move on.

MR. GUYON: It would be nice if she would answer my question.

THE COURT: I think she answered it. Let's move forward. I think we have beat that horse about as much as we can here.

MR. GUYON: The dead horse objection? That's all I have, Judge.

THE COURT: Any follow-up, Mr. Searle?

MR. SEARLE: No, Judge. Judge, the only thing at this point is we would move for the admission of 5 and 6.

THE COURT: Any objection to that?

MR. DRAKE: What was that?

THE COURT: The admission of 5 and 6?

MR. GUYON: The same objection, Judge, surprise.

MR. DRAKE: Your Honor, here is another thing. I was just talking to Gary about this.

THE COURT: Concerning these two exhibits?

MR. DRAKE: Yeah. Or any of the exhibits. The two, 5 and 6, those are the phone records, that sort of thing. It has now become necessary to have me testify as a rebuttal witness, because I never did receive those. Tara testified

that I never asked for the whole file. I did. I never received any of this.

THE COURT: What will be the remedy here? Do you want a continuance or what do you want?

MR. DRAKE: Put me on under oath.

THE COURT: I understand what you are asking me to do. If I find, in fact, you didn't receive these things, and they willfully withheld them from you, then what are you asking for?

MR. DRAKE: That they will not be entered into evidence.

THE COURT: Mr. Searle, would you like to respond to that?

MR. SEARLE: Briefly, judge. Just a moment, sir.

THE COURT: Go ahead.

(A pause in the proceedings.)

MR. SEARLE: Judge, we will withdraw 5 and 6.

THE COURT: 5 and 6 are withdrawn.

MR. SEARLE: Ms. Isaacson, when you gathered your stuff did you have 5 and 6?

MR. DRAKE: What's 4?

MR. HOGAN: 4 is her mock examination script.

MR. DRAKE: Did that come in?

THE COURT: It has.

MR. DRAKE: Because I have never seen that before,

either.

THE COURT: So 5 and 6 are disallowed, then. Aside from that, is there anything else we need to do? Mr. Searle, do you plan to call any other witnesses?

MR. SEARLE: No, I don't have anything else, Judge.

THE COURT: Mr. Drake?

MR. DRAKE: We wanted to call a rebuttal witness, my client. Can I have a few moments with him? I am not going to ask him many questions. He has his affidavit in, but there are a few things under rebuttal, say maybe 30 minutes, max.

THE COURT: To meet with him or put him on the stand?

MR. DRAKE: Oh, no, no, no, no, no.

THE COURT: How much time would you like to meet with him?

MR. DRAKE: I have seven minutes to four. Ten minutes will be fine.

THE COURT: That works out fine. Let's reconvene here right promptly at five after four.

(Court was in recess.)

THE COURT: All right, Mr. Drake, you may call your client.

MR. DRAKE: We call Mr. Millard to the stand.

THE COURT: Mr. Millard, please state your name and spell your last name for the record.

THE WITNESS: Don Millard, last name spelled

ADDENDUM 9

ADDENDUM 9

Ouber v. Guarino, 293 F. 3d 19 - Court of Appeals, 1st Circuit 2002

293 F.3d 19 (2002)

Barbara OUBER, Petitioner, Appellee,
v.
Barbara GUARINO, Respondent, Appellant.

No. 01-2390.

United States Court of Appeals, First Circuit.

Heard April 4, 2002.
Decided June 17, 2002.

20 Linda A. Wagner, Assistant Attorney General, Commonwealth of Massachusetts, with whom Thomas F. Reilly, Attorney General, was on brief, for appellant.

John Updegraph, with whom John Andrews, Robert M. Strasnick, and Andrews & Koufman, LLC, were on brief, for appellee.

Before SELYA, Circuit Judge, STAHL, Senior Circuit Judge, and LYNCH, Circuit Judge.

SELYA, Circuit Judge.

After a Massachusetts jury convicted petitioner-appellee Barbara **Ouber** on a drug-trafficking charge, she exhausted her state-court remedies and then sought habeas corpus relief in the federal district court. That court granted the writ. The Commonwealth's ensuing appeal raises nuanced questions concerning the interplay between the proper resolution of claims asserting ineffective assistance of counsel and the deferential standard of review imposed upon federal habeas courts by the Antiterrorism and Effective Death Penalty Act (AEDPA), Pub.L. No. 104-132, 110 Stat. 1214 (1996). Although our reasoning differs significantly from the district court's as to the prejudice component of the ineffective assistance test, we agree that habeas relief is appropriate in the unique circumstances of this case.

I. BACKGROUND

To put matters into perspective, we recount the background facts, the case's procedural history, the genesis of the petitioner's conviction (including a précis of the evidence adduced at trial), and what transpired thereafter.

The petitioner and her brother (Nick Tsoleridas) resided at 9 Beth Lane in Hyannis, Massachusetts. On January 25, 1992, Todd Shea, an undercover narcotics agent, accompanied by a confidential informant (CI), went to that address. Tsoleridas greeted them. He and the CI then went into the house. Shea was told to wait in the car.

The CI emerged alone. He and Shea waited for Tsoleridas (a suspected drug dealer). After some time had elapsed, the two men grew impatient and approached the front door. The petitioner was standing just inside the entrance and Tsoleridas was descending from upstairs. Shea said something to the effect that he wanted to look at "the package" before turning over
21 any money. Tsoleridas escorted his visitors outside, saying that he did not want to "deal" in

the house. After the three men drove a short distance, Tsoleridas sold Shea an ounce of cocaine for $1,100. He also gave Shea his cell phone number and told him that he could supply much larger quantities.

Tsoleridas delivered comparable amounts of cocaine to Shea on February 19 and March 2. At approximately 4:40 p.m. on March 8, Shea called Tsoleridas and indicated that he wished to purchase ten ounces of cocaine. Tsoleridas tried to persuade Shea to come to Boston to consummate the transaction. When Shea demurred, Tsoleridas offered to supply two ounces to tide him over, and told him to come to the parking lot of Bud's Country Lounge in Hyannis where Tsoleridas's sister would exchange the drugs for $2,000.

Shea testified that the transaction occurred as follows. He reached the parking lot at the appointed time. He saw the petitioner arrive, driving a Toyota. When he entered the passengers' side of the Toyota, the petitioner identified herself as Tsoleridas's sister and handed him two sealed envelopes. Shea asked if this was the same "coke" as before and if the envelopes aggregated the agreed quantity. After receiving an affirmative response, he gave the petitioner $2,000. She counted the money and dropped the bills on the floor of the Toyota. Meanwhile Shea broke the seals, withdrew a clear plastic bag from inside each envelope, and inspected the contents. He then debarked, entered his own vehicle, and departed with the contraband.

At the time of the transaction, the parking lot was deserted except for two law enforcement officers who were observing from a distance. They saw very little. One of them testified, however, that he watched the Toyota enter the parking lot and leave a few minutes after Shea exited the vehicle.

On March 13, Tsoleridas sold Shea the ten ounces of cocaine that Shea had "ordered." Shortly thereafter, the authorities searched the house at 9 Beth Lane and found drugs, large sums of cash, and drugrelated paraphernalia. The petitioner was present during the search. When she asked to see the warrant, however, the officers claimed to have lost it.

A Barnstable County grand jury subsequently indicted both Tsoleridas and the petitioner for trafficking in cocaine. *See* Mass. Gen. Laws ch. 94C, § 32E(b). The petitioner was tried on a single charge, based upon her alleged complicity in the March 8 transaction. She stood trial alone (Tsoleridas having fled the country). Shea and the petitioner were the main witnesses, and they gave sharply conflicting accounts as to what had occurred inside the Toyota.

Shea's testimony was along the lines described above. The petitioner, however, testified that she knew nothing of the drugs, but had been coerced by her brother into doing what she thought was a non-drug-related errand for him. Her version of what happened in the Toyota differed from Shea's in no fewer than four crucial respects. She denied having handed Shea the envelopes, saying that he removed them from the right front seat. She also denied that she and Shea had the conversation he described (or any conversation relating, directly or indirectly, to cocaine). She denied that she counted the money, instead saying that Shea threw it at her (with the result that the bills fluttered to the floor of the Toyota). And, finally, she denied that Shea opened the envelopes or inspected their contents in her presence.

To buttress this account, the defense presented the testimony of the petitioner's friend, Patricia Gisleson. Gisleson testified that she was at the petitioner's home

22 on March 8 and overheard Tsoleridas and the petitioner arguing. Tsoleridas wanted her to deliver two envelopes for him. After the petitioner succumbed to Tsoleridas's bullying, Gisleson helped to move the petitioner's Toyota out of the garage. In the process, she noticed that Tsoleridas had placed two sealed envelopes on the front passenger's seat. The petitioner then drove away. Gisleson was still at 9 Beth Lane when the petitioner returned. The petitioner seemed very upset.

Due to the fact that the search party had been unable to display a warrant, a suppression

order issued. Thus, the Commonwealth could not introduce the evidence seized in the house search during its case in chief. After the petitioner testified, however, the trial justice allowed the Commonwealth to introduce that evidence for impeachment purposes. Following arguments of counsel and the court's charge, the jurors could not reach agreement and the trial justice declared a mistrial.

The Commonwealth elected to retry the petitioner. Much the same proof scenario obtained at the second trial, except that Gisleson's testimony was much more detailed. She stated, inter alia, that Tsoleridas had slapped the petitioner when she initially refused to do his bidding. She also elaborated on the reason that Tsoleridas gave for wanting the petitioner to run the errand: the man she was to meet owed him money, and she was to give the man some drill bits and collect $2,000. Then, too, Gisleson volunteered that the petitioner had told her that, when she met Shea, he had thrown the money at her. Despite Gisleson's more expansive testimony, the jury deadlocked once again.

This brings us to the third trial. Because of their relationship to the issues on appeal, we describe the events that played out during this trial in greater detail.

As the third trial began,[1] the petitioner's counsel — the selfsame lawyer who had represented her at the two earlier trial — selected to deliver his opening statement on the heels of the prosecutor's opening. In the course of this statement, the lawyer promised — not once, but four times — that the petitioner would testify. In the bargain, the lawyer emphasized the importance of this testimony. He pointed out that the case revolved around the petitioner's knowledge (or lack of knowledge) that the envelopes delivered to Shea contained cocaine, and that her version of the relevant events — particularly those that transpired in the car — was very different from Shea's. Counsel's peroration drove home these points. He told the jurors:

The case is going to come down to what happened in that car and what your findings are as you listen to the credibility and the testimony of Todd Shea versus what you[r] findings are as you listen to the testimony of Barbara **Ouber**.

. . . .

.... You're going to hear a difference of opinion as to whether [the envelopes] were handed to Mr. Shea, whether he opened them in front of her; and as to the conversation.

And you're going to have to decide the truth and veracity of those two witnesses; and that will be your ultimate decision in this case.

23 As in the earlier trials, the Commonwealth's case in chief hinged on Shea's testimony. His direct examination yielded the version of the transaction described above. On cross-examination defense counsel brought out a few inconsistencies (e.g., that Shea originally had claimed that the envelopes were unsealed when he received them whereas he now admitted that they were sealed). Defense counsel also attempted to show that Tsoleridas's actions on the occasion of Shea's first visit to 9 Beth Lane indicated that Tsoleridas was trying to conceal his drug trafficking from the petitioner.

Up to a point, the defense case seemed similar to that presented in the previous trials. The defense paraded a large number of character witnesses before the jury, including an Eastern Orthodox bishop and several priests from the petitioner's community. These witnesses were unanimous in attesting to the petitioner's good character and reputation for veracity. A number of them did double duty, declaring that Tsoleridas was abusive and domineering insofar as his sister was concerned. Gisleson also testified along the same lines as at the second trial — although she again added new details. These embellishments included testimony that Tsoleridas had threatened to kill the petitioner if she did not go to meet Shea; that the petitioner told Gisleson, after she returned, that the man she met had tried to get her

to enter is vehicle; and that the petitioner never touched the envelopes.[2]

The trial then veered dramatically from the previous iterations. Although the petitioner had testified in both of the earlier trials, this time around the defense tested without calling her as a witness. Closing arguments followed. In his summation, the petitioner's attorney apologized for not presenting "more of a case" as he had promised, but opined that elements of Shea's and Gisleson's testimony supported a claim that the petitioner lacked knowledge of the envelopes' contents. The prosecutor responded that Shea's testimony, taken as a whole, showed that the petitioner was fully aware that the envelopes contained cocaine, and that there was no reason to doubt his credibility. The prosecutor contrasted this testimony with Gisleson's, which, he argued, had been tailored to protect the petitioner.

Jury deliberations began that afternoon, but court adjourned without a verdict. Deliberations resumed the next morning. Sounding a familiar refrain, the jurors soon reported that they were deadlocked. The trial justice urged them to deliberate further, giving them a supplemental instruction based on *Commonwealth v. Rodriquez*, 364 Mass. 87, 300 N.E.2d 192, 202-03 (Mass.1973) (suggesting suitable language for a "dynamite" charge). Later that day, the jury found the petitioner guilty as charged.

The petitioner moved for a new trial based on ineffectiveness of counsel. To understand the etiology of that claim, we must explore the genesis of the petitioner's decision not to testify. We glean the relevant facts, as did the state courts, primarily from affidavits submitted by the petitioner and her trial attorney in support of the ineffectiveness of counsel claim.

The third trial lasted only two days. According to the lawyer, he first focused on the possibility
24 of withholding the petitioner's testimony on the evening of the first day (after the Commonwealth had rested). A discussion took place in which several priests and other friends of the petitioner participated. The petitioner apparently wanted to testify, but the lawyer persuaded her that it would be in her best interest not to do So.[3] The following day, the lawyer conferred privately with the petitioner, but on the record (i.e., in the presence of a court reporter), so that the petitioner could confirm that she had decided not to testify. The affidavits and the record of that lobby conference make clear, however, that counsel's earlier promises to the jury were not discussed, and that the petitioner was never advised that her decision to refrain from testifying might be counterproductive in light of those promises. This confluence of factors — the decision to withhold the petitioner's testimony after having emphasized its importance and having repeatedly promised the jurors that they would hear it — constituted the essence of the petitioner's ineffective assistance claim.

The state courts were unreceptive to the petitioner's plea. The trial justice denied the motion for a new trial, and the Massachusetts Appeals Court affirmed the trial justice's order. *See Commonwealth v.* ***Ouber***, 46 Mass.App.Ct. 1112, 707 N.E.2d 408 (Mass.App.Ct.1999) (table). The appellate court concluded that the petitioner's lawyer approached the question of whether she should testify "cautiously" and advised her to remain silent because she likely would suffer grievously in cross-examination. Because the attorney was "working with an intrinsically weak defense," the court, applying the test articulated in *Commonwealth v. Saferian*, 366 Mass. 89, 315 N.E.2d 878, 882-83 (Mass. 1974), found his performance constitutionally acceptable. As a fallback, the court observed that the attorney's advice did not prejudice the petitioner because the evidence against her was solid and the jury had been instructed not to draw a negative inference from her silence. The court made only a passing reference to the promises contained in counsel's opening statement, characterizing them as neither "dramatic" nor "memorable." The court added that, when the petitioner decided not to testify, she knew what the consequences would be because she had been through two trials and "[a]n inference about the jury's possible attitude would not be remote or difficult."

In due course, the Massachusetts Supreme Judicial Court (SJC) denied further appellate review. *Commonwealth v.* ***Ouber***, 429 Mass. 1104, 709 N.E.2d 1120 (Mass. 1999) (table).

The petitioner then repaired to the federal district court and prosecuted an application for a writ of habeas corpus against the appropriate state correctional official. *See* 28 U.S.C. § 2254. The district court found the Appeals Court's decision to be an unreasonable application of the standard articulated in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). *See* ***Ouber v. Guarino***, 158 F.Supp.2d 135, 149 (D.Mass. 2001). In the district court's view, the state court improperly focused on a peripheral matter — whether the petitioner was (or was not) fully informed about her right to testify when she decided to remain silent—and brushed aside the critical error in professional judgment: making a promise to the jury and then breaking it. *Id.* at 150. The court found it unreasonable that the Appeals Court did not evaluate the attorney's advice in light of the initial promises that had been communicated to the jury. *Id.* at 153. On this basis, the court concluded that the
25 lawyer's actions fell below the *Strickland* benchmark and that the state court's application of *Strickland*'s performance prong was unreasonable. *Id.* at 154. To cap matters, the court found that the state court had applied the wrong test as to prejudice and concluded that prejudice should be presumed in this case. *See id.* at 155. The court then went a step further and found, in the alternative, that the lawyer's error was outcome-determinative. *Id.* at 155-56.

Consistent with these findings, the district court ordered the petitioner relieved from her sentence unless the Commonwealth vacated her conviction and afforded her a new trial within a stipulated time frame. *See id.* at 156. This appeal ensued. The petitioner has remained free on bail pending the outcome of the habeas proceeding.

II. THE LEGAL FRAMEWORK

As said, this appeal turns on the interplay between the constitutional standard articulated in *Strickland* and the limited review permitted by the AEDPA in habeas cases. We comment on each of these elements.

A. *The Strickland Doctrine.*

The controlling principles for deciding ineffective assistance of counsel claims are limned in *Strickland.* Under these principles, a defendant alleging ineffective assistance of counsel must establish two elements in order to prevail:

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense.

Strickland, 466 U.S. at 687, 104 S.Ct. 2052.

As to the first element, "[j]udicial scrutiny of counsel's performance must be highly deferential." *Id.* at 689, 104 S.Ct. 2052. The practice of law is not a mechanical exercise (like, say, kicking a foot press), and an inquiring court must leave ample room for variations in professional judgment. *See id.* By like token, a reviewing court must not lean too heavily on hindsight: a lawyer's acts and omissions must be judged on the basis of what he knew, or should have known, at the time his tactical choices were made and implemented. *Bell v. Cone*, 535 U.S. , 122 S.Ct. 1843, 1854, 152 L.Ed.2d 914 (2002); *United States v. Natanel*, 938 F.2d 302, 309 (1st Cir.1991). Only if, "in light of all the circumstances, the [alleged] acts or omissions of counsel were outside the wide range of professionally competent assistance," can a finding of deficient performance ensue. *Strickland*, 466 U.S. at

690, 104 S.Ct. 2052.

The second *Strickland* element ensures that, even if a lawyer's performance is constitutionally unacceptable, relief will be withheld unless the quondam client has demonstrated that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694, 104 S.Ct. 2052. While this level of prejudice may be presumed in a few settings, *id.* at 692, 104 S.Ct. 2052, that is the exception, not the rule. For the most part, the petitioner must carry the devoir of persuasion and prove that he was prejudiced, i.e., that his attorney's parlous conduct may have altered the outcome of the case. *See Smith v. Robbins*, 528 U.S. 259, 285-86, 120 S.Ct. 746, 145 L.Ed.2d 756 (2000). In this regard, we caution that, although the possibility of
26 a different out-come must be substantial in order to establish prejudice, it may be less than fifty percent. *See Strickland*, 466 U.S. at 693, 104 S.Ct. 2052 (explaining that "a defendant need not show that counsel's deficient conduct more likely than not altered the outcome in the case").

B. *The AEDPA Standard.*

Under the AEDPA, a federal court may grant habeas relief to a state prisoner only if the state court adjudication

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding.

28 U.S.C. § 2254(d).

A state-court decision fits within the "contrary to" rubric if the state court either applies a legal rule that contradicts an established Supreme Court precedent or reaches a different result on facts materially indistinguishable from those of a controlling Supreme Court precedent. *Williams v. Taylor*, 529 U.S. 362, 405-06, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000). Where a relevant but not factually congruent precedent exists, the state court need only apply a test consistent with the one announced by the Supreme Court in order to avoid the toils of section 2254(d)(1)'s "contrary to" clause.

The "unreasonable application" component of section 2254(d)(1) comes into play when the state court identifies the correct legal principle, but unreasonably applies that principle to the facts of the prisoner's case. *Williams*, 529 U.S. at 407-08, 120 S.Ct. 1495. The "unreasonable application" clause also encompasses situations in which a state court either unreasonably extends a legal principle derived from Supreme Court precedent to an inappropriate context or unreasonably refuses to extend that principle to an appropriate context. *Id.* In all events, a state-court decision must be unreasonable, as opposed to merely incorrect, before a federal court can grant habeas relief. *Id.* at 410, 120 S.Ct. 1495.

The AEDPA also requires that the relevant legal rule be clearly established in a Supreme Court holding, rather than in dictum or in holdings of lower federal courts. *Id.* at 412, 120 S.Ct. 1495. This does not mean, however, that other federal court decisions are wholly irrelevant to the reasonableness determination. "To the extent that inferior federal courts have decided factually similar cases, reference to those decisions is appropriate in assessing the reasonableness *vel non* of the state court's treatment of the contested issue." *O'Brien v. Dubois*, 145 F.3d 16, 25 (1st Cir.1998). Reference to such cases may be especially helpful when the governing Supreme Court precedent articulates a broad principle that applies to a wide variety of factual patterns.

So it is here. The *Strickland* principles for deciding ineffective assistance of counsel claims are "clearly established" for purposes of the AEDPA. *See* Williams, 529 U.S. at 371-74, 120 S.Ct. 1495. Because the Supreme Court has yet to adopt more particularized guidelines for ineffectiveness of counsel claims, it is helpful to examine precedents from lower federal courts to determine how the general standard applies to a particular set of facts. Although such decisions are not themselves binding on a state court under the AEDPA framework, *see id.* at 412, 120 S.Ct. 1495, resort to them is appropriate for the purpose of discerning the
27 requirements of *Strickland* in factually similar cases. *See* Mountjoy v. Warden, N.H. State Prison, 245 F.3d 31, 35-36 (1st Cir. 2001).

Another category of state-court errors that may be remedied on federal habeas review involves unreasonable determinations of fact. *See* 28 U.S.C. § 2254(d)(2). Under this standard, the state court's factual findings are entitled to a presumption of correctness that can be rebutted only by clear and convincing evidence to the contrary. Mastracchio v. Vose, 274 F.3d 590, 597-98 (1st Cir.2001). But the special prophylaxis of section 2254(d)(2) applies only to determinations of "basic, primary, or historical facts." Sanna v. Dipaolo, 265 F.3d 1, 7 (1st Cir.2001). Inferences, characterizations of the facts, and mixed fact/law conclusions are more appropriately analyzed under the "unreasonable application" prong of section 2254(d)(1). *Cf.* Townsend v. Sain, 372 U.S. 293, 309 n. 6, 83 S.Ct. 745, 9 L.Ed.2d 770 (1963) (stating that mixed questions of fact and law do not fall within the purview of section 2254(d)(2)); Sanna, 265 F.3d at 7 (suggesting that only witness credibility and recitals of external events qualify as basic or primary facts for purposes of section 2254(d)(2)). Inasmuch as "both the performance and the prejudice components of the ineffectiveness inquiry are mixed questions of law and fact" for the purposes of federal habeas review, Strickland, 466 U.S. at 698, 104 S.Ct. 2052, section 2254(d)(2) is of limited utility in this case.

III. ANALYSIS

Consistent with the *Strickland* paradigm, we divide our analysis into two parts: performance and prejudice.

A. *Performance.*

At the heart of this appeal lies a broken promise (or, more precisely put, a series of broken promises): defense counsel's repeated vow that the jurors would hear what happened from the petitioner herself. Thus, the error attributed to counsel consists of two inextricably intertwined events: the attorney's initial decision to present the petitioner's testimony as the centerpiece of the defense (and his serial announcement of that fact to the jury in his opening statement) in conjunction with his subsequent decision to advise the petitioner against testifying. Taken alone, each of these decisions may have fallen within the broad universe of acceptable professional judgments. Taken together, however, they are indefensible. Neither the state court nor the Commonwealth has managed to identify any benefit to be derived from such a decisional sequence, and we are unable to see the combination as part and parcel of a reasoned strategy. We therefore conclude that, in the absence of unforeseeable events forcing a change in strategy, the sequence constituted an error in professional judgment. *Cf.* Anderson v. Butler, 858 F.2d 16, 19 (1st Cir.1988) (finding a mistake, rather than a strategic choice, where nothing could be gained from counsel's approach).

This assessment does not end our inquiry. The complex dynamics of trial engender numerous missteps, but only the most inexcusable will support a finding that counsel's performance was so substandard as to compromise a defendant's Sixth Amendment right to proficient legal representation. *See, e.g.,* Nix v. Whiteside, 475 U.S. 157, 164-65, 106 S.Ct. 988, 89 L.Ed.2d 123 (1986) (quoting Strickland, 466 U.S. at 687, 104 S.Ct. 2052). To separate wheat from chaff — lapses of constitutional dimension from garden-variety bevues — we must assess the gravity of the error and then consider potential justifications for the attorney's actions,

28 given what he knew or should have known at each relevant mo-ment in time. *See* Natanel, 938 F.2d at 309. And, finally, because this case comes to us on habeas review, we must examine the reasonableness of the state-court conclusion that counsel's performance was not constitutionally deficient. We turn to these interrelated tasks.

It is apodictic that a defendant cannot be compelled to testify in a criminal case, *see* U.S. Const. amend. V, and criminal juries routinely are admonished — as was the jury here — not to draw an adverse inference from a defendant's failure to testify. But the defendant has the right to testify in her own defense, and, when such testimony is proffered, the impact on the jury can hardly be overestimated. *See* Green v. United States, 365 U.S. 301, 304, 81 S.Ct. 653, 5 L.Ed.2d 670 (1961) ("The most persuasive counsel may not be able to speak for a defendant as the defendant might, with halting eloquence, speak for himself."). When a jury is promised that it will hear the defendant's story from the defendant's own lips, and the defendant then reneges, common sense suggests that the course of trial may be profoundly altered. A broken promise of this magnitude taints both the lawyer who vouchsafed it and the client on whose behalf it was made.

The Commonwealth argues that a defendant's decision about whether to invoke the right to remain silent is a strategic choice, requiring a balancing of risks and benefits. Under ordinary circumstances, that is true. It is easy to imagine that, on the eve of trial, a thoughtful lawyer may remain unsure as to whether to call the defendant as a witness. If such uncertainty exists, however, it is an abecedarian principle that the lawyer must exercise some degree of circumspection. Had the petitioner's counsel temporized — he was under no obligation to make an opening statement at all, much less to open before the prosecution presented its case, and, even if he chose to open, he most assuredly did not have to commit to calling his client as a witness — this would be a different case. *See* Phoenix v. Matesanz, 233 F.3d 77, 85 (1st Cir.2000) (finding no ineffectiveness where, in the absence of an express promise, counsel chose not to call a potentially important witness).

Here, however, the circumstances were far from ordinary. The petitioner's counsel elected to make his opening statement at the earliest possible time. He did not hedge his bets, but, rather, acted as if he had no doubt about whether his client should testify. In the course of his opening statement, he promised, over and over, that the petitioner would testify and exhorted the jurors to draw their ultimate conclusions based on her credibility. In fine, the lawyer structured the entire defense around the prospect of the petitioner's testimony.[4]

In the end, however, the petitioner's testimony was not forthcoming. Despite the fact that the lawyer had called the petitioner to the stand in both prior trials, he did a complete about-face. The lawyer states in his affidavit that he only realized that keeping his client off the witness stand was an option after the first day of trial. This realization came much too late. Indeed, the attorney's delayed reaction is sharply reminiscent of the situation in *Anderson,* in which we observed that even "if it was ... wise [not to have the witness testify] because of the
29 damaging collateral evidence, it was inexcusable to have given the matter so little thought at the outset as to have made the opening promise." 858 F.2d at 18.

The Commonwealth argues that defense counsel's mid-trial decision should be excused as a justified reaction to unfolding events. The theoretical underpinnings for this argument are sound: unexpected developments sometimes may warrant changes in previously announced trial strategies. *See, e.g.,* Dutton v. Brown, 812 F.2d 593, 598 (10th Cir.1987). But although we cannot fault counsel for not guarding against the unforeseeable the case at hand does not fit that description. Here, everything went according to schedule; nothing occurred during the third trial that could have blindsided a reasonably competent attorney or justified a retreat from a promise previously made. After all, the petitioner's lawyer had represented her during two previous trials for the same offense; the prosecution's case in chief did not differ significantly at the third trial; and the situation that confronted the attorney when he changed his mind about the desirability of presenting the petitioner's testimony was no different from the situation that existed at a comparable stage of the earlier trials.

The Commonwealth suggests that the tenor of Shea's testimony justified counsel's last-minute change of heart. Shea's testimony, it says, was stronger and more consistent this time around. The record belies this claim; it shows beyond hope of contradiction that the new wrinkles in Shea's testimony were of marginal significance. Some uncertainties were clarified on direct examination in preparation for the defense's cross-questioning, but this slight tightening-up of the prosecution's case should readily have been anticipated. What is more, even if Shea's testimony was less vulnerable than originally predicted, it remains a mystery why, in response to adverse evidence that proves stronger than expected, a lawyer should decide to abandon the only available avenue of controverting it.

The Commonwealth has another arrow in its quiver: it asserts that, had the petitioner testified, she would have been heavily impeached (and, thus, the decision not to testify was a legitimate one). Because of the damaging evidence that was available for impeachment had the petitioner testified — the drugs and cash found in the search — this argument has a patina of plausibility. The difficulty, however, is that counsel knew of this sword of Damocles — the threat that the impeaching evidence would be introduced — when he made his opening statement.[5] Indeed, that evidence was used to cross-examine the petitioner during the two prior trials, and counsel appeared ready, willing, and able to handle that contingency.

The Commonwealth next argues that enough of the petitioner's story was presented through Gisleson that counsel reasonably could have advised the petitioner not to testify. This is little more than whistling past the graveyard. Gisleson was not present when Shea and the petitioner met on March 8, and so could only relate what she saw and heard before the petitioner left the house and after the petitioner returned. Thus, Gisleson's testimony, on its own, neither provided an adequate defense for the petitioner nor fulfilled the explicit promises made to the jury in the lawyer's opening statement.[6]

30 In all events, Gisleson had testified at each of the earlier trials, and defense counsel knew the substance of her testimony when he promised the jury that the petitioner would testify at the third trial. We add that, to the extent that Gisleson's testimony at the third trial contained variations from her two previous appearances as a witness, those variations do not change the calculus. Some of them — such as the more detailed account of her conversation with the petitioner after she (the petitioner) returned from the parking lot — were probably helpful to the defense, while others — such as her failure to explain that Tsoleridas often made his sister run errands related to his carpentry business — were perhaps detrimental. The inescapable fact, however, is that a witness's testimony is rarely identical two times running. *Cf.* Beachum v. Tansy, 903 F.2d 1321, 1326 (10th Cir.1990) (noting that "uncertainties and minor variations [are] normal to the recollection of honest witnesses after lapse of time"). Thus, the dispositive question must be whether, viewed as a whole, the testimony may be characterized as materially different. We think not: comparing Gisleson's testimony at the second and third trials, the differences are minor and amounted to neither a qualitative change nor an unexpected event justifying an abrupt switch in strategy.[7]

If more were needed—and we doubt that it is — the lawyer's about-face regarding the need for his client's testimony took place between the first and second day of trial. In other words, he changed his mind *before* Gisleson even testified. This chronology erases any suspicion that differences in Gisleson's testimony may have prompted the reversal of strategy.

The short of it is that, without exception, the events that occurred at the third trial should have been easily foreseeable to competent counsel at the time he made his opening statement. There were no surprises — and, thus, the lawyer's tergiversation could not be excused by changed circumstances. *Compare, e.g.,* Magill v. Dugger, 824 F.2d 879, 887-88 (11th Cir. 1987) (finding ineffective assistance because counsel's strategy failed to account for foreseeable testimony), *with* Drake v. Clark, 14 F.3d 351, 356 (7th Cir.1994) (reaching the opposite conclusion when counsel's strategy was frustrated by an unforeseeable development).

Were we sitting in direct review, the foregoing analysis would lead us to find counsel's performance constitutionally unacceptable. In the exercise of habeas jurisdiction, however, we must take another step and evaluate the reasonableness of the Appeals Court's contrary conclusion. *See* 28 U.S.C. § 2254(d)(1). *Strickland* constitutes the established Supreme Court precedent, and the state court purported to apply the functional equivalent of
31 *Strickland*'s performance prong.[8] Because it did so — and because the facts of this case differ significantly from those of *Strickland* — this case does not fit within the confines of section 2254(d)(1)'s "contrary to" clause insofar as counsel's performance is concerned. Rather, the crux of the matter is whether the state court applied *Strickland*'s performance standard in an objectively reasonable manner when it determined that the lawyer's performance did not fall below the constitutional minimum.

We start this phase of our analysis with the text of the state-court decision. The state court first absolved the attorney from responsibility for failing to present the petitioner's testimony because the petitioner herself possessed enough sophistication to make such a decision. This determination misses the point of the petitioner's constitutional claim. While a decision about whether to testify ultimately rests with the defendant, *see* Rock v. Arkansas, 483 U.S. 44, 49-53, 107 S.Ct. 2704, 97 L.Ed.2d 37 (1987), a defendant's waiver of the right to testify must be knowing, informed, and intelligent. This implies an understanding of the consequences of the decision. *See* United States v. Manjarrez, 258 F.3d 618, 623-24 (7th Cir.2001). Yet, the affidavits of both the petitioner and her trial counsel make it clear that she was *not* informed about the potential impact that the broken promises might have on the jury should she decide not to testify.[9]

A second problem with the state-court decision lies in its characterization of defense counsel's approach in his opening statement. Despite the unambiguous, emphatic, and oft-repeated comments regarding both the imminence and the salience of the petitioner's testimony, the state court asserted that "counsel approached cautiously the question of [the petitioner] testifying." Here, however, the record makes manifest that trial counsel's approach to the question of calling the petitioner as a witness — making an unconditional promise, repeating it four times over, and then breaking it without justification — was the antithesis of caution. Because the state-court's characterization is not borne out by any plausible reading of the record, we deem it unreasonable. *See* O'Brien, 145 F.3d at 25 (stating that if a state-court determination is devoid of record support, it fits within the "unreasonable application" prong of section 2254(d)(1)).

Finally, the state court offered only a single reason why counsel might legitimately have changed his mind about calling the petitioner to the witness stand, namely, that the barbed cross-examination of Gisleson intimated that the petitioner would undergo an even fiercer attack. That hypothesis does not withstand scrutiny. For one thing, counsel reversed course
32 *before* Gisleson testified. For another thing, the Commonwealth's strongest attack on Gisleson relied on her knowledge of the suppressed evidence. Because Gisleson's cross-examination put some of that same information before the jury, *see supra* note 2, her testimony actually removed part of the rationale for not putting the petitioner on the witness stand. In other respects, Gisleson's testimony was no more severely impeached than in the previous trials — trials in which both Gisleson and the petitioner had testified and had held their own under withering cross-examination. At the very least, the petitioner's counsel should have anticipated the ferocity of potential cross-examination when he was deciding what to tell the jury in his opening statement. The Appeals Court's attempted justification is, therefore, plainly insupportable.

To sum up, counsel committed an obvious error, without any semblance of a colorable excuse. There is simply no record support for the state court's finding that the attorney's conduct constituted a reasonable strategic choice. To the contrary, the only sensible conclusion that can be drawn from this record is that the attorney's performance was constitutionally deficient under *Strickland* — and severely so. We hold, therefore, that the state-court finding on this point constituted an unreasonable application of the *Strickland*

performance prong.

B. *Prejudice.*

The remaining issue involves the state court's determination that counsel's performance, even if constitutionally deficient, did not prejudice the petitioner. The district court found fault with the state court's application of *Commonwealth v. Saferian, supra*, positing that, insofar as prejudice is concerned, *Saferian* articulates a standard contrary to *Strickland*. ***Ouber***, 158 F.Supp.2d at 154 (arguing that *Saferian* concentrates on whether counsel's mistake deprived the accused of a substantial ground of defense rather than whether the mistake altered the outcome of the trial). We disagree with this assessment.

Although *Strickland* and *Saferian* do not employ identical phraseology, we have described those variations as "minor" and have concluded that, for habeas purposes, *Saferian* is a functional equivalent of *Strickland*. *Scarpa*, 38 F.3d at 7-8. That is the law of the circuit. Moreover, that interpretation squares with the relevant Massachusetts case law. While *Saferian* predated *Strickland*, the SJC since has concluded that *Saferian* is at least as solicitous of Sixth Amendment rights as *Strickland*. *See* *Commonwealth v. Urena*, 417 Mass. 692, 632 N.E.2d 1200, 1202 (Mass.1994); *Commonwealth v. Fuller*, 394 Mass. 251, 475 N.E.2d 381, 385 n. 3 (Mass.1985). In light of these precedents, we are unable to sustain the district court's conclusion that *Saferian* runs contrary to *Strickland* (and, thus, that the Appeals Court's decision is contrary to settled Supreme Court case law).

The district court committed another error when it ruled that the state court's "no prejudice" decision was unreasonable because prejudice must be presumed when an attorney inexcusably fails to carry out an announced promise to present an important witness. ***Ouber***, 158 F.Supp.2d at 155. To the extent that the district court meant that the prejudice inquiry demanded by *Strickland* is superfluous in such a case, that holding is not grounded in any established Supreme Court precedent. To the contrary, the Court repeatedly has emphasized the limited nature of any exceptions to the general rule that a defendant must demonstrate actual prejudice. *See* *Mickens v. Taylor*, ___ U.S. ___, 122 S.Ct. 1237, 1246, 152 L.Ed.2d
33 291 (2002); *Smith*, 528 U.S. at 287, 120 S.Ct. 746; *Strickland*, 466 U.S. at 692, 104 S.Ct. 2052.

As recently as May 28, 2002, the Court reiterated that prejudice may be presumed only in three narrowly circumscribed situations. *Bell*, 122 S.Ct. at 1850. First, a trial is presumptively unfair if the accused is completely denied the presence of counsel at a critical stage of the proceedings. *Id.* (citing, inter alia, *Hamilton v. Alabama*, 368 U.S. 52, 54, 82 S. Ct. 157, 7 L.Ed.2d 114 (1961)). Second, such a presumption is warranted if "counsel entirely fails to subject the prosecution's case to meaningful adversarial testing." *Id.* at 1851 (quoting *United States v. Cronic*, 466 U.S. 648, 659, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984)). Third, prejudice may be presumed in the presence of circumstances under which a competent lawyer would likely not be able to render effective assistance. *Id.* (citing *Powell v. Alabama*, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932)).

In this case, the district court did not assert that any of these exceptions apply, and, in all events, the record would not support such an assertion. Instead, the district court appeared to read *Anderson* as carving out a new exception. ***Ouber***, 158 F.Supp.2d at 154. Whether or not *Anderson* intended to do so is beside the point, since the weight of recent Supreme Court precedent is to the contrary. *See, e.g.*, *Bell*, 122 S.Ct. at 1850-51; *Mickens*, ___ U.S. at ___, 122 S.Ct. at 1246. We have heeded the Court's clear message in the past, *e.g.*, *Scarpa*, 38 F.3d at 11, and we are constrained to heed it here. Because the circumstances of this case do not fall within the contours of any of the three recognized exceptions to the *Strickland*

formulation, a presumption of prejudice cannot be condoned.

Setting the misplaced presumption to one side, we turn to the task of determining whether, on

the facts of this case, the error was prejudicial. For this purpose, an error generally is considered prejudicial if there is a strong possibility that it affected the outcome of the trial. *See* Strickland, 466 U.S. at 693-94, 104 S.Ct. 2052. Consequently, we must consider, on whole-record review, whether the trial might have ended differently absent the lawyer's blunder. This is normally a difficult endeavor, but we are aided here by a unique circumstance: this was the petitioner's third trial, and the only substantial difference among those trials relates to the omission of her testimony at the third trial. Thus, unlike in the vast majority of cases, we have actual rather than hypothetical reference points to guide our inquiry.[10]

When the petitioner testified, two different juries found the prosecution's case so evanescent that they were unable to reach a verdict. Even without the petitioner's testimony, the jury in the third trial was deadlocked for a time. Given these facts, we are bound to conclude that the case was exceedingly close.

In a borderline case, even a relatively small error is likely to tilt the decisional scales. *See, e.g.*, Frey v. Fulcomer, 974 F.2d 348, 369 (3d Cir.1992). The error here — failing to present the promised testimony of an important witness — was not small, but monumental. *See, e.g.*, Anderson, 858 F.2d at 18-19; *cf.* United States v. Gonzalez-Maldonado, 115 F.3d 9, 15 (1st Cir.1997) (finding reversible error when the trial judge initially agreed that

34 an important witness could testify, but later barred that witness from testifying). The net result of the failure to call the petitioner to the witness stand was that the jury heard only Shea's version of what transpired in the car. Yet, the petitioner's version would have been materially different with respect to certain critical aspects, such as whether Shea opened the envelopes in front of her and whether any verbal exchange regarding the contents (e.g., the weight and quality of the cocaine) occurred. Because these contradictions were not introduced into evidence, the jury never had an opportunity to assess the conflicting testimony or to weigh the petitioner's credibility against Shea's. What is worse, counsel's belated decision not to present the petitioner's testimony sabotaged the bulk of his efforts prior to that time (and, in the process, undermined his own standing with the jury, thereby further diminishing the petitioner's chances of success). Because the error was egregious, we are fully persuaded that, but for its commission, a different outcome might well have eventuated. Accordingly, the case satisfies the prejudice prong of the *Strickland* framework.

Under the AEDPA, an erroneous determination is not necessarily an unreasonable determination. Williams, 529 U.S. at 410, 120 S.Ct. 1495. Thus, it remains for us to address whether the state court's finding of no prejudice was not only incorrect but also unreasonable. The test is an objective one. *See id.* It focuses on the state court's ultimate conclusion rather than on the strength of the court's announced rationale. *See* Bui v. DiPaolo, 170 F.3d 232, 243-44 (1st Cir.1999) (stating that "state courts are not required to supply the specific reasons that a federal court thinks are most persuasive for upholding the judgment"), *cert. denied,* 529 U.S. 1086, 120 S.Ct. 1717, 146 L.Ed.2d 640 (2000); *accord* Hurtado v. Tucker, 245 F.3d 7, 19 (1st Cir.), *cert. denied,* ___, 122 S.Ct. 282, 151 L.Ed.2d 208 (2001); O'Brien, 145 F.3d at 25. In other words, the hallmark of a reasonable determination is the result reached by the state court, not the ratiocination leading to that result.

Here, the Massachusetts Appeals Court's "no prejudice" determination is not a credible outcome. That tribunal dealt with the question of prejudice *vel non* in a single paragraph, which reads:

To omit to call a witness who has been promised can, of course, be a serious mistake, but whether it is such in any given case is dependent on the circumstances, as the law recognizes. [string citations omitted] The promise here was not made dramatically or memorably, as it was in *[Anderson]*. Counsel's apology in closing was brief and subdued. That the jury were not overcome by the unfulfilled promise is indicated by the fact that it took a [dynamite] charge to inspire the verdict. The verdict itself found solid support in the

evidence. The judge charged against any invidious implication from the defendant's silence.

As can be seen, this paragraph contains several assertions — but these assertions are either irrelevant or devoid of record support. We explain briefly.

The state court opined that defense counsel's opening promises were not "dramatic" or "memorable." We find it hard to imagine, however, how the court could have reached that conclusion. The attorney made the promises explicitly and repeatedly. He also exhorted the jurors to base their ultimate decision on their collective assessment of the contrasting accounts that would be given by Shea and the petitioner, respectively. This call for a
35 credibility judgment was the crowning element of the lawyer's opening statement and could not have failed to make an impression on the jury. The single promise in *Anderson*, 858 F.2d at 17 — a case in which counsel did not urge the jurors to rest their decision on the credibility of the witness who was promised but not produced — was certainly far less dramatic and memorable.

The state court also implied that the alleged error was inconsequential because the jury initially deadlocked and therefore was not immediately overborne by the detrimental effect of the broken promises. This argument effectively assumes that because a blunder did not lead to a summary conviction, it was of negligible effect. We believe that such an assumption is unreasonable; the fact that the jury convicted the petitioner only after prolonged deliberations and a supplemental "dynamite" charge necessarily underscores the closeness of the case (and, therefore, the gravity of *any* error).

The Appeals Court also posited that the petitioner's case was "intrinsically weak," and that the jury's verdict rested on solid evidence. The court, however, did not buttress these conclusory statements with any specific findings, and they are belied by the record. Indeed, the very fact that the first two trials ended in hung juries is powerful proof that those statements are insupportable. At each of those trials, the evidence marshaled against the petitioner was so underwhelming that the jurors were unable to reach a decision. The state court failed to consider this fact, or to suggest why doing so might be unhelpful.

The remaining factors mentioned by the Appeals Court bear little relevance to the prejudice inquiry. The fact that counsel's apology to the jury was "subdued" neither establishes the insignificance of the original promises nor palliates the effect of the mistake. The fact that the jury was advised not to draw a negative inference from the petitioner's failure to testify is likewise irrelevant; the attorney's mistake was not in invoking the petitioner's right to remain silent, but in "the totality of the opening and the failure to follow through." *Anderson*, 858 F.2d at 17.

To sum up, this was the petitioner's third trial and the only salient difference between it and the two prior trials was the absence of her testimony. This time around, defense counsel made a promise, hammered it home, and then broke it. The first two trials, at which the petitioner testified, offer a prime example of how this trial likely would have ended in the absence of this stunning error. We believe that it was unreasonable for the state court not to have taken such obvious reference points into account. Had it done so, it would have been bound to conclude that the case was a close one in which counsel's egregious error was likely to have made a dispositive difference.

That ends the matter. Since neither the state court's opinion nor our own careful perscrutation of the record reveals an objectively reasonable ground for the state court's "no prejudice" determination, we are constrained to set it aside.

IV. CONCLUSION

We need go no further. Had the state court applied *Strickland* in an objectively reasonable manner, it would have been bound to conclude that defense counsel's abandonment of the

oft-repeated promise that the petitioner would testify, enunciated in his opening statement, amounted to ineffective assistance of counsel in violation of the Sixth Amendment. The lawyer was intimately familiar with the case before he made this promise (having represented the petitioner in two prior trials on the same charges). Yet, he staked his client's defense on the strength of her testimony and then, with no discernible justification, changed his mind and
36 decided that she should not testify. No significant change in circumstances occurred between the time of the lawyer's opening statement and the time of his about-face. This was a serious error in professional judgment, and the state court's contrary determination represented an unreasonable application of *Strickland*'s performance prong.

Here, moreover, the prior trials serve as a meaningful benchmark for determining the likelihood that the outcome of the third trial was affected by the lawyer's mistake. Those trials, neither of which was marred by the same error, produced results materially different from the one reached in the third trial. Yet, the state court inexplicably failed to undertake this comparative analysis. We conclude, therefore, that the state court's harmlessness determination represented an unreasonable application of *Strickland*'s prejudice prong.

For these reasons, we affirm the judgment of the district court. The petitioner shall be entitled to a writ of habeas corpus unless the Commonwealth affords her a new trial within the period prescribed.

Affirmed.

[1] The ground rules vis-a-vis the illegally seized evidence were essentially the same as for the first two trials, that is, the trial justice ruled that the Commonwealth could introduce evidence from the search only if the petitioner testified (and then, only for impeachment purposes).

[2] During the second trial, the defense, apparently anticipating that the previously suppressed evidence garnered during the warrantless search would be used to impeach the petitioner, brought out some information concerning that evidence on Gisleson's direct examination. During the third trial, defense counsel spurned this tactic, but the prosecution was able to bring before the jury, in the course of Gisleson's cross-examination, essentially the same information.

[3] The priests assisted in this endeavor, but the petitioner claims, without contradiction, that the priests were merely advocating for the position that the lawyer espoused.

[4] Counsel's subsequent actions reinforced this perception. He called twenty-four character witnesses who testified as to the petitioner's reputation for veracity. This procession set the stage for her testimony by enhancing her credibility. When she did not testify, this stage-setting quite likely intensified the negative impact on the jury.

[5] The fact of the matter is that the lawyer alluded to the evidence that would be adduced for impeachment purposes in his opening statement, cautioning the jury to keep in mind that such evidence would be admitted only for a limited purpose.

[6] To be sure, Gisleson related some of what the petitioner allegedly had told her about the events that occurred in the parking lot. Her testimony, however, failed to contradict Shea's on three crucial issues: whether there was any conversation regarding the contents of the envelopes, whether he opened the envelopes in front of the petitioner, and whether the latter counted the money in his presence. At any rate, Gisleson's testimony about the petitioner's statements was rank hearsay, and did not afford the factfinders an opportunity to see and hear the petitioner's detailed, first-hand account of the transaction.

[7] This conclusion is also buttressed by defense counsel's summation to the jury in which he made light of the added details in Gisleson's testimony.

[8] Although the state court did not refer to *Strickland* by name, it applied a similar standard articulated in *Saferian*, 315 N.E.2d at 882-83. We have indicated that the *Saferian* standard is roughly equivalent to the *Strickland* standard, *see Scarpa*, 38 F.3d at 7-8, and the Massachusetts courts have noted that *Saferian* is at least as favorable to the defendant as *Strickland*, *see, e.g.*, *Commonwealth v. Fuller*, 394 Mass. 251, 475 N.E.2d 381, 385 n. 3 (Mass.1985). Thus, the state court applied a constitutionally proper performance standard (and, accordingly, the state-court decision is not "contrary to" clearly established Supreme Court precedent).

[9] We add, moreover, that if the attorney improperly counseled his client to eschew appearing as a witness after having promised the jury that she would testify, the fact that the client "voluntarily" embraced this erroneous advice seems insufficient to palliate the constitutional effects of the attorney's error. But we need not

probe this point too deeply, as the Commonwealth has made no developed argument to the effect that the petitioner's independent choice forecloses the ineffective assistance claim. *See United States v. Zannino*, 895 F.2d 1, 17 (1st Cir.1990) (noting that "issues..., unaccompanied by some effort at developed argumentation, are deemed waived").

[10] We caution that the likelihood of a different outcome may not always be synonymous with prejudice. *See Strickland*, 466 U.S. at 695, 104 S.Ct. 2052 (noting that when acquittal would be likely only because of improper collateral considerations a defendant should not reap the benefit of a new trial). That caveat is not applicable in this instance.

People v. Briones, 816 NE 2d 1120 - Ill: Appellate Court, 5th Dist. 2004

816 N.E.2d 1120 (2004)
352 Ill. App.3d 913
287 Ill.Dec. 909

The PEOPLE of the State of Illinois, Plaintiff-Appellee,
v.
Brandon BRIONES, Defendant-Appellant.

No. 5-02-0821.

Appellate Court of Illinois, Fifth District.

September 30, 2004.
Rehearing Denied October 27, 2004.

1121 Daniel M. Kirwan, Deputy Defender, Office of the State Appellate Defender, Mt. Vernon, for Appellant.

James Creason, State's Attorney, Salem; Norbert J. Goetten, Director, Stephen E. Norris, Deputy Director, Kendra S. Peterson, Staff Attorney, Office of State's Attorneys Appellate Prosecutor, Mt. Vernon, for Appellee.

Justice HOPKINS delivered the opinion of the court:

Following a jury trial, the defendant, Brandon **Briones**, was convicted of criminal damage to property (720 ILCS 5/21-1(1)(a) (West 2002)) and sentenced to two years in prison. On appeal, the defendant argues that he was denied the effective assistance of counsel. We reverse and remand.

FACTS

On May 30, 2002, the State charged the defendant by an amended information with criminal damage to property worth more than $300 (720 ILCS 5/21-1(1)(a), (2) (West 2002)) and aggravated discharge of a firearm (720 ILCS 5/24-1.2(a)(1) (West 2002)).

At the defendant's jury trial, the State presented the following evidence.

In the early morning hours of May 11, 2002, Darrel Moulton, with another man who stood in the darkness, knocked on the door of Michael Peyton and Darla Wynn's mobile home. When Michael opened the door, Darrel and Michael argued.

Darla was lying in bed where she could view the door. When Michael and Darrel moved away from the door, Darla recognized the defendant, her nephew, poking his head around Darrel to smile in the light. Michael, who had a vision problem and was not wearing his glasses, was unsure of the accompanying man's identity.

Michael shut the door but anticipated danger, so he began to dress. After five minutes, gunshots were fired at the mobile home. Darla and Michael exited the home and drove away in their truck. Darla and Michael recognized the defendant's voice when the defendant

shouted that Darla and Michael were leaving.

Michael saw Darrel jump onto the back of the truck, after which the rear window on the truck's camper shell shattered. When she heard the window break, Darla saw the defendant standing on the rear bumper of the truck. After the window shattered, Michael stopped the truck and saw two men running down the road. When Darla shouted at the defendant, he stopped and turned. The defendant was not wearing a shirt.

Approximately seven minutes later, after Michael and Darla had driven to an unmanned police station, they returned to their residence. Their mobile home was on fire, the windows in their other two vehicles and in Darla's daughter's vehicle were broken, and police and fire personnel were on the scene. As a mechanic, Michael estimated that the cost to replace the windows exceeded $300.

Don Tate, Darla and Michael's neighbor, testified that on the night in question, he returned home after midnight and heard yelling, gunshots, and windows smashing. He entered his home, telephoned the police, and returned outside. Don saw Darrel and Brian Thompson enter the mobile home, saw a "big flash of light," and saw the two men run from the mobile home. Don also witnessed another male, wearing no shirt, running near the mobile home, but Don could not positively identify the man as the defendant.

In denying the defendant's motion for a directed verdict, the circuit court noted that the evidence was "not overwhelming."

1122 During opening statements, the defendant's counsel stated:

> "The evidence will show that [the defendant] gave a statement to Officer Squibb. He told Officer Squibb[:] [']I wasn't there. I was over here at Conrad and Tina Wynn's house.[']
>
> * * *
>
> [The defendant] has no obligation to testify. * * * But he's going to get up here on this witness stand and he's going to testify and he's going to tell you the truth and he's going to subject himself to rigorous cross-examination by the State and he's going to do that because he's going to tell you the truth."

The defense called Darrel Moulton, who had pled guilty to residential arson with regard to the present case. Darrel testified that on the night in question, he approached Michael and Darla's mobile home with Avery Swarms, the defendant's cousin, not the defendant. Darrel testified that he and Avery had been drinking at Brian Thompson's house, that they approached Michael and Darla's mobile home, that Darrel argued with Michael, and that Brian Thompson shot at the mobile home. Darrel testified that when Michael and Darla attempted to leave, he and Avery chased them. Darrel testified that he broke Michael and Darla's truck window with a baseball bat and that Avery ran behind him.

Darrel testified that after he had broken Michael's truck window, he threw the baseball bat in a field, kicked in the front door of the mobile home, and ignited the home. Darrel testified that he then approached neighbors for a ride to town, including Conrad Wynn, whose window he approached for his request. Darrel then saw the defendant driving in his vehicle. Darrel asked the defendant for a ride, the defendant agreed, and the police later apprehended them together.

During cross-examination, Darrel admitted that in a handwritten statement, given to police on May 30, he stated:

> "The last I saw of [the defendant] before he picked me up at the church was when I was in Brian's back yard and Darla and Mike were leaving. He picked

> up something and broke out their back window on their camper shell on the truck. That's when Brian's in the house getting another weapon."

Conrad and Tina Wynn, the defendant's brother and sister-in-law, lived near Darla and Michael. Conrad and Tina testified that at least 30 minutes before the fire started at Michael and Darla's home, the defendant arrived at the Wynn home and watched a movie with them. While the defendant was in their home, they heard pounding noises and saw the fire through their window. Before the defendant left their home, Darrel appeared at the window, and Conrad declined Darrel's request for a ride to town.

Conrad testified that approximately two weeks later, Avery admitted to him that the defendant was charged with crimes Avery had committed. Conrad testified that Avery and the defendant looked similar and that he sometimes confused the two.

Ramona Forbes, the defendant's mother, testified that Avery, who was her nephew, admitted to burning Michael and Darla's mobile home.

Avery Swarms testified that he lived two blocks from Darla and Michael's mobile home. Avery testified that on the night of the fire, he alternated between his home and William DeMain's home and that he witnessed the fire from across the street. Avery began walking toward the
1123 fire but returned home when he saw the fire and emergency vehicles. Avery denied involvement in the activities that damaged Michael and Darla's mobile home and vehicles. Avery also denied telling Conrad or the defendant's mother that the defendant was charged with crimes he had committed. Avery testified that he did not see Darrel, Brian, the defendant, Michael, or Darla that night.

William DeMain testified that on the night of the fire, Avery was at his home early in the evening and William fell asleep on his couch. When William woke, he stepped outside, saw the fire, and walked toward it. Heading that way, William encountered Avery, who was also walking toward the fire. The police and fire vehicles arrived thereafter.

The defendant did not testify.

During the State's rebuttal, the State recalled Officer Robert Squibb. Defense counsel objected to the State's questions to Officer Squibb regarding the defendant's postarrest statement. In his statement, the defendant asserted that on the night of the fire, he spoke with Chrystal Logsdon until approximately 10:45 p.m., went to his grandmother's to watch television, drove around, saw the fire, went to Conrad's home, and watched the fire. The court held the defendant's statements admissible as admissions by a party opponent, an exception to the hearsay rule.

The circuit court also stated:

> "You said yesterday in opening statements your client was going to testify, so I kind of anticipated that. * * * I want to at least make a record on that."

In response to the circuit court's questioning, the defendant stated that it was his decision, along with his counsel's, that he not testify.

During the jury instruction conference, defense counsel tendered a jury instruction regarding the weight to be given identification testimony (Illinois Pattern Jury Instructions, Criminal, No. 3.15 (4th ed.2000)). The circuit court suggested including "or" between each element, the State agreed, and defense counsel withdrew the proposed instruction, which had omitted the word "or." As a result, the jury was instructed as follows:

> "When you weigh the identification testimony of a witness, you should consider all the facts and circumstances in evidence, including, but not limited to, the following:

> The opportunity the witness had to view the offender at the time of the offense, or
>
> The witness's degree of attention at the time of the offense, or
>
> The level of certainty shown by the witness when confronting the defendant, or
>
> The length of time between the offense and the identification confrontation."

The jury found the defendant guilty of criminal damage to property over $300 but not guilty of aggravated discharge of a firearm. On December 5, 2002, the circuit court sentenced the defendant to two years in prison. The defendant filed a timely notice of appeal.

ANALYSIS

Pursuant to both the United States Constitution (U.S. Const., amend.VI) and the Illinois Constitution (Ill. Const. 1970, art. I, § 8), an accused has a due process right to the effective assistance of counsel in a criminal prosecution. ***People*** *v. Connor*, 82 Ill.App.3d 652, 657, 37 Ill.Dec. 860, 402 N.E.2d 862 (1980). A defendant raising an ineffective-assistance-of-counsel claim must meet the two-part test enunciated in *Strickland v. Washington*, 466 U.S. 668, 104
1124 S.Ct. 2052, 80 L.Ed.2d 674 (1984), and adopted by the Illinois Supreme Court in ***People*** *v. Albanese*, 104 Ill.2d 504, 85 Ill. Dec. 441, 473 N.E.2d 1246 (1984). To prevail on a claim of ineffective assistance of counsel, the defendant must show that his counsel's performance was so seriously deficient that it fell below an objective standard of reasonableness under prevailing professional norms, that is, counsel made errors so serious that he no longer functioned as the "counsel" guaranteed by the sixth amendment. *Strickland*, 466 U.S. at 687, 104 S.Ct. at 2064, 80 L.Ed.2d at 693; *Albanese*, 104 Ill.2d at 525, 85 Ill.Dec. 441, 473 N.E.2d 1246. To establish deficiency, the defendant must overcome the strong presumption that counsel's challenged action or inaction was the product of sound trial strategy. *Strickland*, 466 U.S. at 689, 104 S.Ct. at 2065, 80 L.Ed.2d at 694-95.

The defendant must also show that his counsel's deficient performance so prejudiced him that it denied him a fair trial, a trial whose result is reliable. *Strickland*, 466 U.S. at 687, 104 S.Ct. at 2064, 80 L.Ed.2d at 693; *Albanese*, 104 Ill.2d at 525, 85 Ill.Dec. 441, 473 N.E.2d 1246. To show prejudice, the defendant must establish a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 694, 104 S.Ct. at 2068, 80 L.Ed.2d at 698. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Albanese*, 104 Ill.2d at 525, 85 Ill.Dec. 441, 473 N.E.2d 1246.

"[A] defendant is entitled to a fair trial, not a perfect one." ***People*** *v. Easley*, 192 Ill.2d 307, 344, 249 Ill.Dec. 537, 736 N.E.2d 975 (2000). Likewise, the right to the effective assistance of counsel refers to competent, not perfect, representation. *Easley*, 192 Ill.2d at 344, 249 Ill.Dec. 537, 736 N.E.2d 975; ***People*** *v. Stewart*, 104 Ill.2d 463, 492, 85 Ill.Dec. 422, 473 N.E.2d 1227 (1984). Only the most egregious of tactical or strategic blunders may provide a basis for a violation of a defendant's right to the effective assistance of counsel (***People*** *v. Kubik*, 214 Ill.App.3d 649, 661, 158 Ill.Dec. 152, 573 N.E.2d 1337 (1991)), such as when trial counsel's chosen strategy was so unsound that counsel completely failed to conduct any meaningful adversarial testing (***People*** *v. Reid*, 179 Ill.2d 297, 310, 228 Ill.Dec. 179, 688 N.E.2d 1156 (1997)).

The defendant argues that his counsel was deficient because she set the defense up to be discredited by promising the jury that the defendant would testify to the truth and, inexplicably, failing to call him. We agree.

In *United States ex rel. Hampton v. Leibach*, 347 F.3d 219, 257 (7th Cir.2003), contrary to trial counsel's promise to the jury in opening statements, the defendant did not testify. The

federal appellate court held, "[W]hen the failure to present the promised testimony cannot be chalked up to unforeseeable events, the attorney's broken promise may be unreasonable, for 'little is more damaging than to fail to produce important evidence that had been promised in an opening.'" *Leibach*, 347 F.3d at 257 (quoting *Anderson v. Butler*, 858 F.2d 16, 17 (1st Cir.1988)). The court continued:

> "Promising a particular type of testimony creates an expectation in the minds of jurors, and when defense counsel without explanation fails to keep that promise, the jury may well infer that the testimony would have been adverse to his client and may also question the attorney's credibility. In no sense does it serve the defendant's interests." *Leibach*, 347 F.3d at 259.

1125 Similarly, in *Ouber v. Guarino,* the federal appellate court stated:

> "When a jury is promised that it will hear the defendant's story from the defendant's own lips, and the defendant then reneges, common sense suggests that the course of trial may be profoundly altered. A broken promise of this magnitude taints both the lawyer who vouchsafed it and the client on whose behalf it was made." *Ouber v. Guarino*, 293 F.3d 19, 28 (1st Cir.2002).

See also ***People*** *v. Patterson*, 192 Ill.2d 93, 121, 249 Ill.Dec. 12, 735 N.E.2d 616 (2000) (the defendant was entitled to a postconviction evidentiary hearing involving an ineffective-assistance claim because defense counsel failed to produce evidence he had promised in opening statements); ***People*** *v. Lewis*, 240 Ill.App.3d 463, 468, 182 Ill. Dec. 139, 609 N.E.2d 673 (1992) (defense counsel was incompetent for promising, during opening statements, to produce the defendant's pretrial exonerating statement when the statement was actually inadmissible hearsay); ***People*** *v. Chandler*, 129 Ill.2d 233, 249, 135 Ill.Dec. 543, 543 N.E.2d 1290 (1989) (defense counsel failed to subject the prosecution's case to meaningful adversarial testing, in part because counsel failed to call the defendant to testify, despite his opening statement to the contrary).

In ***People*** *v. Manning,* contrary to defense counsel's promise during opening statements, the defendant informed the trial court that he did not want to testify. ***People*** *v. Manning*, 334 Ill.App.3d 882, 892, 268 Ill.Dec. 600, 778 N.E.2d 1222 (2002). The appellate court stated that because it could not determine from the record whether counsel's decision was based upon the defendant's choice not to testify, sound trial strategy, or incompetence, the court presumed it was the result of trial strategy and rejected the defendant's ineffective-assistance-of-counsel claim. *Manning*, 334 Ill.App.3d at 893, 268 Ill.Dec. 600, 778 N.E.2d 1222.

We agree with *Manning* that if the defendant, contrary to defense counsel's previous assertion, decided not to testify at the trial, his counsel's performance was not deficient. However, we decline to presume that defense counsel's decision not to present the defendant's testimony, after promising to do so in opening statements, was the result of trial strategy.

Although the defendant must overcome the strong presumption that his counsel's challenged action or inaction was the product of sound trial strategy (*Strickland*, 466 U.S. at 689, 104 S.Ct. at 2065, 80 L.Ed.2d at 694-95), once defense counsel promised the jury that the defendant would tell the truth from his own lips and then counsel reneged on that promise, in no sense could it serve the defendant's interests (see *Leibach*, 347 F.3d at 259). When defense counsel promised the jury in opening statements that the defendant would testify but counsel later determined that the promise would go unfulfilled, it was counsel's responsibility to evidence in the record that she was not deficient, *i.e.,* that the determination was a result of the defendant's fickleness or of counsel's sound trial strategy due to unexpected events. Because defense counsel in the case *sub judice* failed to show in the record that the defendant inexplicably changed his decision to testify or that, because of unexpected events, sound trial strategy required her to break her promise that the defendant would testify, we find

that counsel's performance, in failing to present the defendant's testimony that she had promised in opening statements, was deficient.

The defendant also argues that his trial counsel was ineffective for allowing the jury to be
1126 improperly instructed regarding the weight to be given the identification testimony of Darla and Michael. We agree.

In ***People*** *v. Gonzalez,* the trial court had instructed the jury as follows:

> "`When you weigh the identification testimony of a witness, you should consider all the facts and circumstances in evidence, including but not limited to the following:
>
> The opportunity the witness had to view the offender at the time of the offense; *or*
>
> The witness'[s] degree of attention at the time of the offense; *or*
>
> The witness'[s] earlier description of the offender; *or*
>
> The level of certainty shown by the witness when confronting the defendant; *or*
>
> The length of time between the offense and the identification confrontation.' (Emphasis added.)" ***People*** *v. Gonzalez,* 326 Ill.App.3d 629, 637, 260 Ill.Dec. 354, 761 N.E.2d 198 (2001).

In *Gonzalez,* as in the present case, the controversy surrounding the wording of the instruction involved the trial court's use of the word "or" between each of the five factors. *Gonzalez,* 326 Ill.App.3d at 637, 260 Ill.Dec. 354, 761 N.E.2d 198. The Illinois pattern instruction states the following:

> "When you weigh the identification testimony of a witness, you should consider all the facts and circumstances in evidence, including, but not limited to, the following:
>
> [1] The opportunity the witness had to view the offender at the time of the offense.
>
> [or]
>
> [2] The witness's degree of attention at the time of the offense.
>
> [or]
>
> [3] The witness's earlier description of the offender.
>
> [or]
>
> [4] The level of certainty shown by the witness when confronting the defendant.
>
> [or]
>
> [5] The length of time between the offense and the identification confrontation." Illinois Pattern Jury Instructions, Criminal, No. 3.15 (4th ed.2000).

The appellate court in *Gonzalez* held that the incorporation of the word "or" between each factor incorrectly implied, as a matter of law, that the identification testimony of an eyewitness may be deemed reliable if just one of the five factors weighs in favor of reliability. *Gonzalez,* 326 Ill.App.3d at 640, 260 Ill.Dec. 354, 761 N.E.2d 198. The appellate court held that the trial

court's error in so instructing the jury was improper and prejudicial. *Gonzalez*, 326 Ill.App.3d at 641, 260 Ill.Dec. 354, 761 N.E.2d 198.

Similarly, in the present case, the circuit court erred in including the word "or" between the factors the jury was to consider in evaluating the eyewitness identification testimony. Although defense counsel submitted a proper instruction, she accepted the court's suggestion that her instruction was in error and withdrew it. Defense counsel was deficient in failing to cite *Gonzalez* to support the correct, proposed jury instruction and in withdrawing it.

The defendant also cites the following tactical or strategic errors by his counsel: (1) his counsel allowed into evidence his statement to Officer Squibb when the statement was inconsistent with the defense, *i.e.*, in the statement, the defendant claimed that he did not
1127 arrive at his brother's home until after the fire had started, (2) his counsel called Avery Swarms as a witness even though counsel knew that Avery would not admit his culpability for the crimes, (3) his counsel failed to request that Darrel Moulton's oral statements to Officer Squibb be limited as impeachment evidence, (4) his counsel called Darrel to testify for the defense when Darrel's testimony allowed the State to show on cross-examination that Darrel had previously lied to the police and that Darrel had previously told the police that the defendant had accompanied him during the crime, and (5) his counsel provided alibi testimony that was impeached with the defendant's prior inconsistent statement.

Such tactical or strategic errors by counsel cannot support a claim of ineffective assistance of counsel unless trial counsel's chosen strategy was so unsound that counsel completely failed to conduct any meaningful adversarial testing. See *Reid*, 179 Ill.2d at 310, 228 Ill.Dec. 179, 688 N.E.2d 1156. Although we find that counsel's strategy was not so unsound that counsel completely failed to conduct any meaningful adversarial testing, trial counsel's strategy was refutable, and in conjunction with trial counsel's errors in failing to present promised testimony by the defendant and in allowing the jury to be misinstructed, we find that the defendant was prejudiced.

The prosecution's case primarily involved the testimony of Michael and Darla and their opportunity to identify their assailants under low light and while fleeing from their home. At the conclusion of the State's case, the circuit court noted that the evidence against the defendant was not overwhelming. From our review of the proceedings as a whole, considering the aggregate errors of defense counsel, we find that the verdict cannot be relied upon with confidence. See ***People*** *v. Moore*, 279 Ill.App.3d 152, 162, 215 Ill.Dec. 479, 663 N.E.2d 490 (1996) ("[t]he question is not whether the defendant would more likely than not have received a different result without the professional errors of counsel but whether, with their presence, he received a fair trial, understood as a trial resulting in a verdict worthy of confidence"). We hold that the defendant was denied his right to the effective assistance of counsel.

On the other hand, although not overwhelming, the evidence against the defendant was sufficient to prove him guilty beyond a reasonable doubt. We therefore find no double jeopardy impediment to a new trial. See ***People*** *v. Fornear*, 176 Ill.2d 523, 535, 224 Ill.Dec. 12, 680 N.E.2d 1383 (1997).

CONCLUSION

For the foregoing reasons, the judgment of the circuit court of Marion County is reversed, and the cause is remanded for a new trial.

Reversed; cause remanded.

CHAPMAN, P.J., and KUEHN, J., concur.

State v. Zimmerman, 823 SW 2d 220 - Tenn: Court of Criminal Appeals, Nashville 1991

823 S.W.2d 220 (1991)

STATE of Tennessee, Appellee,
v.
Laurie ZIMMERMAN, Appellant.

Court of Criminal Appeals of Tennessee, at Nashville.

September 24, 1991.

221 David L. Raybin, Hollins, Wagster & Yarbrough, P.C., Nashville, Tenn., for appellant.

Charles W. Burson, Atty. Gen. and Reporter, Merrilyn Feirman, Asst. Atty. Gen., Nashville, Guy Dotson, Atty. Gen., Murfreesboro, for **State**.

No Application for Permission to Appeal to the Supreme Court.

OPINION

WADE, Judge.

The defendant, Laurie **Zimmerman**, appeals her conviction of second degree murder. She was sentenced to 15 years. The issue presented for review is whether her trial counsel was ineffective.

We find in favor of the defendant, reverse the conviction, and remand the cause for a new trial.

Attorney David Vincent initially represented the defendant. Two days before trial, he associated Herbert Rich as co-counsel. The defense strategy was that the defendant, a battered wife, stabbed her husband in self-defense. The defendant, a clinical psychologist, the defendant's nine and eleven-year-old children, and other witnesses were scheduled to testify on the defendant's behalf. Before the trial began, the **state** agreed to stipulate that the victim had a blood alcohol content of .11 percent when examined after his death.

During the opening statement, Attorney Rich announced to the jury that the defendant would testify; he stated that a psychologist who had treated the defendant would explain the
222 "battered wife syndrome" and testify favorably for the defense. This was in accordance with the strategy mapped out by Attorney Vincent and otherwise met with Vincent's approval. As a part of its proof-in-chief, the **state** presented portions of a pretrial statement made by the defendant. The victim's brother, a next-door neighbor, two officers, and the emergency room physician also testified for the prosecution. When the **state** rested, Attorney Vincent, over the private objections of his co-counsel, recommended to the defendant that she not testify. The defendant confirmed her approval of the decision in a jury-out hearing. The defense rested. Neither the psychologist nor the other defense witnesses were called to give testimony. After final argument the jury returned with a verdict of guilt.

I

The victim, Mark **Zimmerman**, was 30 years old. He and the defendant had been married for approximately three years and had a two-year-old son, Brian. The defendant had two minor children by a prior marriage. The Zimmermans operated a business from their home called Marketing World, Incorporated, a publication which advertised video movies.

Just before midnight on Saturday, March 17, 1990, Tony Benton, a neighbor to the victim and the defendant, thought someone was trying to break into his home. When he went to the door, he found the victim wounded and bleeding. Benton directed his wife to call 911, noticed the victim was not breathing, and attempted CPR. Police arrived first, then an ambulance. Within minutes of the stabbing, the victim was transported to the Middle Tennessee Medical Center. An emergency physician attempted resuscitation but was unsuccessful.

Medical evidence established that the knife wound was to the victim's back, just to the left of the spinal cord and below the sternum. The wound was four inches in diameter and extended into the chest cavity. The aorta was severed and the victim bled to death. Death probably occurred within five to eight minutes of the wound.

Officer Randy Garrett of the Murfreesboro Police Department investigated. When he arrived at defendant's residence, he found her upset and crying. She immediately stated, "I stabbed him ... it was an accident." The defendant told the officer that the victim had been drinking and had tape recorded their conversation. Upon further questioning, the defendant related that the victim threatened to take the two-year-old child and leave. She said there was a brief struggle, she somehow wound up with a butcher knife, and stabbed the victim as he reached for their child. She stated that the victim ran out of the residence, apparently removing the knife as he did so. The officer searched the area and found a 12 inch butcher knife in the driveway between the defendant's residence and that of Tony Benton.

The officer found a coat near the open closet door of the master bedroom. Photographs showed blood stains on clothing and the carpet near the Zimmermans' closet, and on the floor and wall near the door of the Benton residence. Another officer detected that the defendant had red marks on her arms, one shoulder, and her lower back. The defendant told that officer that she received the marks in her struggle with the victim prior to the stabbing.

On cross-examination, the first officer testified from his report to portions of the defendant's statements. He acknowledged that the defendant had told him that the victim, prior to the stabbing, took hold of her hand and said, evidently for purposes of the tape recording, "Let me go." On redirect, the officer read from his report of the incident:

> Mr. **Zimmerman** started grabbing her arm, stating "I am tape recording this," talking as he grabbed her saying, "You're accosting me...." **Zimmerman** shut their two-year-old son, Brian, in a closet in the master bedroom and then asked Laurie where he was. Mr. **Zimmerman** got the butcher knife from the kitchen, and a brief struggle occurred, with Laurie retrieving the knife. **Zimmerman**
> 223 opened the closet door, reaching for Brian, stating "I am going to take him, you're unfit." Laurie stated she then stabbed Mr. **Zimmerman**.

Officers recovered the tape recording the victim made of his conversation with the defendant just prior to the stabbing. The day before, the defendant had gone to court to ask for a protective order against the victim. The victim had not appeared to defend and a hearing was scheduled for the following Monday. The victim prefaced the recording with the following statement:

> Today's date is March 17, 1990, and I'm using this as my protection against Laurie in the event that she accuses me of any type of verbal abuse or physically abuses me.

The tape recording, which lasted about 27 minutes, was played for the jury. Some of the

recorded conversation related to business operations. There was discussion about why the defendant had taken out the protective order. The defendant accused the victim of being an alcoholic, having punched her while she slept at 3:00 A.M. in the morning, and having passed out the same evening on their two-year-old son's bed. At various points, the defendant and the victim called each other liars. The defendant accused the victim of having embezzled money from a prior employer; referred to him as "Mr. Alcoholic"; and stated, in reference to the hearing on the protective order, she had his "ass" and "little dick in a ringer." Both were angry. Voices were raised during much of the taped conversations. The victim accused the defendant of building her "case on lies" and of perpetuating a fraud on the court. He announced that he was getting some clothes and leaving. As the victim walked out the door, the defendant pled with him to talk some more. She repeatedly professed her love for the victim. He refused to talk further. The tape, found by officers in the victim's jacket, ends when the victim walks back into the residence, expressing concern for their son's whereabouts, and the victim's response, "Oh, stop it." From all appearances, the stabbing occurred only minutes after the tape recorder was turned off.

II

The defendant discharged her trial attorneys prior to the motion for new trial. Through her new counsel, she contends that she was ineffectively represented at trial. She argues that her counsel misled the jury by promising a specific defense in the opening statement and then presenting no proof after the **state** completed its case. She asserts that her trial counsel failed to utilize her witnesses and other available evidence which would have been helpful in her defense; she submits that her trial counsel was ineffective by his recommendation that she not testify.

After a lengthy hearing on the motion for new trial, the trial court found that the defendant made a conscientious decision not to testify based on inconsistencies or inadequacies in her pre-trial statements; there was sufficient investigation; there was no ineffectiveness by the failure to negotiate a plea since the defendant had directed her counsel that she would not accept any offer involving the service of any sentence; reliance upon the discovered material excused any failure on trial counsel's part to interview any **state** witnesses; the failure to interview defense witnesses did not constitute ineffectiveness; the decision to deviate from the strategy announced in the opening statement was a sound decision; the failure to point out the differences in the size of the victim versus the defendant was not ineffective; the failure to cross-examine the **state's** witness, Dr. Thrush, who not only treated the victim but also the defendant after a March 8, 1990, incident, was not prejudicial; the failure to place in evidence that the defendant had made a 911 call after the stabbing was not prejudicial; the failure to place certain photographs into evidence was not prejudicial; the failure to get into evidence the stipulation of the victim's blood alcohol was not ineffective assistance; the failure to place into evidence the victim's business records, indicating both drug and alcohol use, was not prejudicial; the failure to call witnesses to testify as to the relationship of the defendant and the victim between 1986 and 1988 was too remote to have been prejudicial;
224 the failure to call other witnesses, including the defendant's children, was not prejudicial; and the failure to present the testimony of the psychologist, who had counseled with the Zimmermans during the marriage, was a reasonable strategy decision.

III

In order to establish that her counsel was ineffective, the defendant must show in the post-conviction proceeding that the advice given or the services rendered were not within the range of competence of attorneys in criminal cases. *Baxter v. Rose*, 523 S.W.2d 930 (Tenn. 1975). She must also establish that but for her counsel's deficient performance, the results of the trial would have been different. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

The burden is on the petitioner to show that the evidence preponderates against the findings of the trial judge who, in this instance, found in favor of the **state**. *Clenny v. **State***, 576 S.W.2d 12 (Tenn. Crim. App. 1978). The findings in the trial court on questions of fact may not be reversed on appeal unless the evidence preponderates otherwise. *Graves v. **State***, 512 S.W.2d 603 (Tenn. Crim. App. 1973).

In *Strickland,* the standard of review on the issue of assistance of counsel was stated as follows:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or ... sentence resulted from a breakdown in the adversary process that renders the result unreliable.

466 U.S. at 687, 104 S.Ct. at 2064.

To establish prejudice, the evidence stemming from the failure to prepare a sound defense or present witnesses must be significant, but it does not necessarily follow that the trial would have otherwise resulted in an acquittal. *Id.* at 2071; *see Nealy v. Cabana*, 764 F.2d 1173 (5th Cir.1985); *Code v. Montgomery*, 799 F.2d 1481 (11th Cir.1986).

In our review of this record, both of the trial and the hearing on the motion for new trial, we have adhered to the clear warnings of *Strickland* "to eliminate the distorting effects of hindsight ... and to evaluate the conduct from counsel's perspective at the time." 466 U.S. at 689, 104 S.Ct. at 2065. We are nonetheless constrained to hold that the efforts of trial counsel were deficient, not necessarily with respect to preparation or investigation, but by the peremptory abandonment of the pre-established and reasonably sound defense strategy — providing for the testimony of the defendant, a psychologist, certain stipulated proof, and supportive witnesses — and the cumulative effect of related errors. At the same time, we must conclude that the evidence presented at the motion for new trial preponderates against the finding of the trial court.

IV

In this case, there was an indictment for second degree murder. The **state** presented its proof in an effective, orderly manner and rested at the conclusion of the first day of trial. A case had been made for the offense charged.

The defense strategy was to use the defendant as a witness, to support her testimony with that of the psychologist and other witnesses that she was a physically abused and battered wife under unusual stress at the time of the incident. Documentary evidence had been prepared to establish that the victim was a heavy drinker. The **state** stipulated that the victim's blood alcohol content was over the presumptive level of intoxication. There were no surprises in the presentation of the **state's** case. Yet, in spite of the protests of Attorney
225 Rich, the lead counsel at trial, conceding that an acquittal was an impossibility, advised his client to "shut down" the case. The **state's** stipulation regarding the victim's intoxication was not admitted into proof; upon questioning at the motion for new trial, Attorney Vincent responded, "I forgot."

The first component of the test established in *Strickland* is as follows:

> A convicted defendant making a claim of ineffective assistance must identify the

> acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The court must then determine whether, *in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance.* In making that determination, the court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case.

Id., 466 U.S. at 690, 104 S.Ct. at 2066 (emphasis added).

As to the second component, there must be a reasonable probability that but for counsel's unprofessional error, *"the result of the proceeding would have been different,"* not that it necessarily would have been different. 466 U.S. at 693, 104 S.Ct. at 2068 (emphasis added). The probable result need not be an acquittal. A reasonable probability of being found guilty of a lesser charge, or a shorter sentence, satisfies the second prong in *Strickland. Chambers v. Armontrout*, 907 F.2d 825, 832 (8th Cir.1990).

A. OPENING STATEMENT

Rich, with the approval of lead counsel, delivered the opening statement. The defendant was described as a battered and abused woman who had suffered through three years of marriage to the victim. The jury was told that it would "hear from Laurie in this case" and that it would "hear from Dr. Victor O'Bryan, who would explain the battered wife syndrome, would confirm the defendant's efforts to get help for the victim's drinking habits," and would assist the jury to understand that the defendant "didn't intend to kill her husband." The theme was repeated throughout the opening statement and the jury was advised that there were other options in addition to second degree murder, such as manslaughter or criminally negligent homicide.

Opening statements are relatively new to the criminal law in this **state**. As late as 1963, in the case of *Carroll v. **State***, 212 Tenn. 464, 370 S.W.2d 523, our Supreme Court held that there could be no opening statement in a criminal case. In the same year, the legislature enacted a statute permitting opening statements in both civil and criminal trials. Tenn. Code Ann. § 20-9-301. Either overstatement or misstatement during this presentation, despite curative efforts, may have adverse effects:

> The trial attorney should only inform the jury of the evidence that he is sure he can prove.... His failure to keep [a] promise [to the jury] impairs his personal credibility. The jury may view unsupported claims as an outright attempt at misrepresentation.

McCloskey, *Criminal Law Desk Book,* § 1506(3)(O) (Matthew Bender, 1990).

In ***State** v. Moorman*, 320 N.C. 387, 358 S.E.2d 502 (1987), the North Carolina Supreme Court found ineffective assistance of counsel based upon the failure to present evidence promised during the opening statement:

> A cardinal tenant of successful advocacy is that the advocate be unquestionably credible. If the fact finder loses confidence in the credibility of the advocate, it loses confidence in the credibility of the advocate's cause.
>
> ....
>
> The defense's failure to produce any evidence to support the theories proffered at the outset of the trial formed the basis of the closing arguments made by the **state** in favor of conviction.

Id. 358 S.E.2d at 510-511.

We note here that the district attorney general, in closing argument, reminded the jury that
226 the opening statement made on behalf of the defendant was nothing more than a "smoke screen — they were going to show you that this woman had been abused and battered." The defect was underscored by the final argument made by Mr. Vincent. He referred to facts, obviously intended to be, but never presented to the jury during the course of the trial; the **state's** objection to any factual reference to the March 8, 1990, protective order was sustained. We also note that Mr. Rich, who vehemently disagreed with the change in strategy, declined to participate in the final argument on the basis that he "couldn't face the jury."

The **state** concedes that if the decision to abandon its promised course of defense was arbitrary, the defendant was provided ineffective assistance of counsel; but it argues that the plan was based upon wellreasoned logic. That is, that the defendant was a very risky witness and that there were inconsistencies in her explanation of the events. While those assertions may be so, nothing changed during the course of the trial with regard to either the pre-trial statements she had made to officers or the defendant's ability to articulate her defense. In other words, there appears to have been no basis for the sudden change in strategy. Those inconsistencies were just as apparent during the opening statement as they were at the conclusion of the **state's** proof.

B. FAILURE TO CALL WITNESSES

Secondly, we hold that if trial counsel's failure to follow through with the promise made in the opening statement had been neither deficient nor prejudicial, the failure to call the defendant's favorable witnesses available would call into question the performance of trial counsel. As to this point, the **state** makes an innovative if not altogether credible argument that this decision not to call supportive witnesses was a sound trial tactic. By explanation, the defendant, upon advice of her trial counsel, had elected not to testify. Consequently, the rationale not to use the other witnesses is best reflected by a portion of Mr. Vincent's testimony at the hearing on the motion for new trial:

> Well, it was my opinion, and in every criminal case, the jury wants to hear from the defendant, regardless of the charge. This was a case where self-defense was the defense. The defense was not battered wife syndrome. The defense was self-defense.... *She was the centerpiece of that defense.* Dr. O'Bryan's testimony and the other witnesses' testimony would only complement hers. And my feeling was that *Dr. O'Bryan's testimony would heighten their desire to hear from Ms.* ***Zimmerman*** *and would have an adverse effect.*

(Emphasis added.)

The logical conclusion of this reasoning, of course, is that in any case where the defendant does not testify, no defense witnesses should be called. The effect here was that no evidence at all, favorable or otherwise, was presented by the defense. Not only did the defendant and her witnesses fail to testify, but matters which the defense should have routinely placed into evidence, such as the victim's level of intoxication, the details of the assault resulting in the protective order, the defendant's 911 call for help after the stabbing, the nature of bruises or abrasions to the defendant, the relative size of the defendant and the victim, as well as other matters, were never placed into evidence.

We conclude that the proof introduced by the defendant at the motion for new trial met the standard for deficient performance:

> When a petitioner contends that trial counsel failed to discover, interview, or present witnesses in support of his defense, these witnesses should be

> presented by the petitioner at the evidentiary hearing. As a general rule, this is the only way the petitioner can establish that (a) a material witness existed and the witness could have been discovered but for counsel's neglect in his investigation of the case, (b) a known witness was not interviewed, (c) the failure to discover or interview a witness inured to his prejudice, or (d) the failure to have a known witness present or call the witness to the stand resulted
> 227 in the denial of critical evidence which inured to the prejudice of the petitioner.

*Black v. **State***, 794 S.W.2d 752, 757 (Tenn. Crim. App. 1980).

Trial counsel has a duty to use witnesses who may be of assistance to the defense. In this instance, those witnesses which could have been produced by the defendant might not have persuaded the jury to acquit. There is a reasonable probability, however, that if the witnesses had been used in accordance with the original plan, the defendant might have been convicted of a lesser offense. In summary, we find no reasonable basis for the defendant to have changed strategy and decided not to call Dr. O'Bryan, neighbors who knew that the victim had assaulted the defendant previously, or the defendant's two older children.

Dr. O'Bryan, for example, had treated the defendant, and to a lesser degree the victim, as early as October 5, 1987. Days before this incident, he treated the defendant for "post-traumatic stress disorder," a form of the battered woman syndrome. The substance of his testimony would have offered mitigating circumstances as to the defendant's culpability. It was Dr. O'Bryan's opinion that the defendant's reaction was due to a sense of "hypervigilance," a characteristic of her stress, and that her reaction "was just sheer survival response."

Further, trial counsel did not cross-examine the emergency room physician about the March 8th incident. Dr. Thrush, who examined the victim after the stabbing and testified to his findings, had also treated the defendant for a cervical strain due to the victim's earlier attempt "to strangle her last night." Obviously, evidence of the earlier incident would have been consistent with the defense.

Although the jury may have rejected Dr. O'Bryan's testimony, the point is that they were never afforded the opportunity to hear from the psychologist. The several other witnesses presented by the defendant during the motion for new trial hearing would have given testimony consistent with the defense theory and, at the very least, provided the jury a reasonable opportunity to consider a lesser degree of homicide. The failure to call these witnesses was, we think, indicative of deficient performance by trial counsel.

C. FAILURE OF DEFENDANT TO TESTIFY

Finally, the cumulative effect of the misleading opening statement and the failure to present favorable witnesses and other evidence was exacerbated by the trial counsel's recommendation to the defendant not to testify. Trial counsel knew that it was generally important for the defendant to testify. His testimony established that. Moreover, the failure of a defense attorney to call the defendant is often a key factor on the issue of ineffective assistance. In a similar case, this court, in its remand for a new trial, cited factors which would tend to indicate ineffective assistance in that regard:

> (1) only the victim and the defendant were present when the offense was committed;
>
> (2) only the defendant could present a "full version of her theory of the facts";
>
> (3) the defendant's testimony could not be impeached by prior criminal convictions;

(4) the defendant could give an account of the relationship with the victim; and

(5) the attorney had let in objectionable, prejudicial testimony with the intention of clarifying it with the testimony of the defendant.

***State** v. Gfeller,* No. 87-59-III, 1987 WL 14328 (Tenn. Crim. App., Nashville, July 24, 1987).

The first four factors are applicable here. The announcement of trial counsel that the defendant would testify and explain the circumstances of the stabbing are analogous to the fifth factor. Further, there was other evidence favorable to the defendant that would have come into the record, including the intoxication level of the victim, that did not because of trial counsel's decision to rest the case.

The *Gfeller* case involved an abused female defendant who had been charged with the
228 murder of her husband. Because so many of the circumstances are similar to those presented here, the case is practically indistinguishable.

Moreover, it is a rare situation indeed where there are not some inconsistencies in the pre-trial statements made by any defendant. For the most part, those made by this defendant were relatively consistent. The only possible inconsistency was in regard to how the stabbing itself occurred. While that was and is clearly a problem for the defense, the pre-established strategy was to confront the issue with the defendant's testimony. We see nothing in the **state's** proof that would have warranted such a dramatic change in tactics. The testimony of Dr. O'Bryan and others would have helped explain the reactions of the defendant and any possible inaccuracies in her recollection of the events.

Whatever inconsistencies existed were well known to defense counsel prior to the trial. Nothing in this record indicates that an abrupt change of strategy was in order. If it was appropriate for the defendant not to testify, that decision could and should have been made, in this particular situation, at the beginning of the trial.

It may be that none of these three areas of deficient performance, standing alone, would have justified the grant of a new trial. Yet, we think that the cumulative effect of these errors deprived the defendant of a meaningful defense. The reliability of the verdict is in question. We reiterate that these circumstances may not have justified an acquittal; there is considerable evidence indicating guilt of the crime charged. There is, however, a thin line between second degree murder and voluntary manslaughter. Had the defendant's proof been presented to the jury, as planned, there is a reasonable probability that the results would have been more favorable to the defendant.

The judgment is reversed. The matter is remanded for a new trial.

PEAY, J., and JOE D. DUNCAN, Special Judge, concur.

ADDENDUM 10

ADDENDUM 10

David Drake
Utah State Bar # 0911
6905 South 1300 East #248
Midvale, UT 84047
Telephone: (801) 205-9049
Facsimile: (801) 233-3575

Peter W. Guyon
Utah State Bar # 1285
614 Newhouse Building
10 Exchange Place
Salt Lake City, UT 84111
Telephone: (801) 322-5555
Facsimile: (801) 322-5558

IN THE THIRD DISTRICT COURT OF THE STATE OF UTAH
TOOELE DEPARTMENT, COUNTY OF TOOELE

---ooo0ooo---

THE STATE OF UTAH,	:	**MOTION TO SUPPLEMENT REMAND HEARING RECORD**
Plaintiff/Appellee,	:	
-vs-	:	Appellate Case no. 20060336-SC
DONALD MILLARD,	:	Trial Court Case No. 041300401
Defendant/Appellant.	:	Judge Mark S. Kouris

—ooo0ooo—

COMES NOW defendant/appellant (hereinafter "Don "), through counsel, and pursuant to Rule 12, U.R.Crim.P., moves this Court for an order allowing Don to supplement the remand hearing record to include a letter from David Drake to Tara Isaacson, dated September 22, 2006, in order to refute Ms. Isaacson's cross-examination testimony concerning two points, viz., that David Drake

never told her that he requested her whole file and that she never received his September 22, 2006 letter. This letter indicates that Mr. Drake did request her whole file and emphasized this several times in his letter and that she did receive the letter since that letter contained a check in the amount of $506.25 to settle Bugden's and Isaacson's billing statement of $1,012.50 for supposedly photocopying their ***whole*** file. Obviously Ms. Isaacson, to whom David Drake's letter was addressed, received the September 22, 2006 letter since she cashed the $506.25 check. Don is also requesting that the record be supplemented with a copy of the Zions Bank statement showing that she received and negotiated the $506.25 check. It is in the interest of justice and fair play that the record be supplemented as requested since State's Exhibit 4 (prepared by Tara Isaacson but never delivered to David Drake) was received into evidence and which these two documents requested to supplement the record can refute.

As set forth in the accompanying memorandum, Ms. Isaacson's testimony and State's Exhibit 4 took Don by surprise. On or about September 30, 2008, David Drake personally met with Gary Searle in Tooele, Utah and asked him whether he had any exhibits he would submit during the remand hearing. Mr. Searle told Mr. Drake that the state would not be offering any exhibits into evidence at the remand hearing. Consequently, the testimony of Tara Isaacson, based upon the exhibits she prepared (State's proposed Exhibits 5 and 6 were not accepted into evidence) and which the State succeeded in placing Exhibit 4 into evidence, took Don by surprise which could not have been cured by any amount of due diligence. Therefore, it is respectfully requested that Don be able to supplement the record with David Drake's September 22, 2006 letter and the Zions Bank statement demonstrating receipt of this letter, contrary to the testimony of Tara Isaacson.

This motion is based upon the accompanying and supporting verified memorandum of points and authorities.

DATED October 16, 2008.

DAVID DRAKE, P.C.
Attorney for Appellant/Defendant

David Drake

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on October 16, 2008 a true and correct copy of the foregoing motion to supplement the remand hearing record was served by facsimile and mailed, first class postage prepaid, to the following:

Gary K. Searle, Esq.
Deputy Tooele County Attorney
47 South 100 East
Tooele, UT 84074
(Fax: 435/843-3127)

with the original mailed to:

Clerk, 3d District Court
74 South 100 East, Suite 14
Tooele, UT 84074

By:

David Drake
Utah State Bar # 0911
6905 South 1300 East #248
Midvale, UT 84047
Telephone: (801) 205-9049
Facsimile: (801) 233-3575

Peter W. Guyon
Utah State Bar # 1285
614 Newhouse Building
10 Exchange Place
Salt Lake City, UT 84111
Telephone: (801) 322-5555
Facsimile: (801) 322-5558

IN THE THIRD DISTRICT COURT OF THE STATE OF UTAH
TOOELE DEPARTMENT, COUNTY OF TOOELE

---oooOooo---

THE STATE OF UTAH,	:	**MEMORANDUM IN SUPPORT OF MOTION TO SUPPLEMENT**
Plaintiff/Appellee,	:	**REMAND HEARING RECORD (VERIFIED)**
-vs-	:	
		Appellate Case No. 20060336-CA
DONALD MILLARD,	:	
		Trial Court Case No. 041300401
Defendant/Appellant.	:	Judge Mark S. Kouris

---oooOooo---

COMES NOW defendant/appellant (hereinafter "Don "), through counsel, and pursuant to Rule 12, U.R.Crim.P., submits this Memorandum in Support of Motion to Supplement Remand Hearing Record by supplementing and including in the record the September 22, 2006 letter sent by David Drake to Tara Isaacson, the effect of which refutes the testimony of Tara Isaacson as set forth

in Don's Motion To Supplement Remand Hearing Record and the Zions Bank statement showing that Tara Isaacson negotiated the $506.25 check included in the September 22, 2006 letter. This letter is attached hereto, incorporated hereat, and marked Exhibit A. The Zions Bank statement is attached hereto, incorporated hereat, and marked Exhibit B. This memorandum is being filed pursuant to Rule 12(a), U.R.Crim.P. Motion and is based upon the following:

1. At the remand hearing and during her cross-examination concerning State's proposed exhibits 4, 5, and 6 which Tara Isaacson testified that she prepared, Tara Isaacson testified under oath that David Drake had never requested her whole file.[1] Mr. Guyon was then handed David Drake's laptop computer from which he read to Ms. Isaacson David Drake's September 22, 2006 letter:

> I received a copy of your September 7, 2006 statement from Duane Millard. Needless to say, the amount of your statement was disconcerting since some of your billing entries are subject to question. I can understand the amount of time in your first entry to review the files for appeal in order to identify documents for me to organize and index. However, your billing entry implies I did not receive the whole file, only an edited version. Since I am doing the appeal for Don Millard and as I requested from you during our initial conversation, I wanted copies of your ***whole*** file, not the documents you deem are necessary for the appeal. It is necessary that I receive all documents in order to frame the issues I deem are relevant to the appeal. Have I received your ***whole*** file? Please fax me the answer to this inquiry as soon as possible. (I do thank you for your cooperation to date.) [Emphasis in the original.]

2. After this letter being read to her by Mr. Guyon, Tara Isaacson stated she never received the letter, even though it was addressed to her. Again, that statement is completely false

---

[1] Ms. Isaacson attempted to introduce into evidence various documents that had never been delivered to Mr. Drake when Mr. Drake began his representation of Don in order to file an appeal of his conviction and requested on April 12, 2006 that her whole file be submitted to him (***and which she is mandated to do under the Rules of Professional Responsibility)***. These documents had never been seen by Mr. Drake and had never been forwarded to Mr. Drake when Mr. Drake became Don's attorney of record in order to file the appeal (the notice of appeal was filed April 12, 2006). Shortly after becoming Don's appellate attorney, he requested that Tara Isaacson submit her whole file to him. When it became apparent she had not done so, Mr. Drake sent her the September 22, 2006 letter again emphasizing he wanted her whole file. Yet, at the remand hearing, Tara Isaacson, through the State, attempted to introduce into evidence documents (which supposedly exonerated her) which had never been provided Mr. Drake and had never been seen by Mr. Drake until October 2, 2008. This Court can draw its own conclusions.

based upon the fact that this letter also contained a check in the amount of $506.25 as a settlement and compromise of the $1,012.50 she was billing for her speaking to David Drake about the file and photocopying the file to be delivered to David Drake. Again, Exhibit B is a copy of the Zion's Bank checking account statement showing that check number 1953 in the amount of $506.25 made payable to Bugden and Isaacson had been negotiated by Tara Isaacson and/or her firm. This is irrefutable evidence that contrary to her testimony at the remand hearing, Tara Isaacson received the September 22, 2006 letter from David Drake wherein he emphasized that the whole file must be produced and which contained the settlement amount check of $506.25 which she and/or her firm negotiated.

3. With the whole file being requested and which was subsequently delivered, the testimony of Tara Isaacson concerning State's proposed Exhibits 4, 5, and 6 is highly suspect. The need to supplement the record as requested by Donald Millard is even more compelling to refute this testimony and in light of the fact that State's proposed Exhibit 4 was received into evidence.

4. Again, with Exhibit 4 being received into evidence, this supplementation of the record is necessary and is in the interest of justice. This supplementation balances the record especially in view of the fact that State's Exhibit 4 was never provided Mr. Drake when he requested that Tara Isaacson submit to him her whole file concerning Donald Millard and the introduction of such caught Donald Millard and his counsel unawares through no fault of their own and through no amount of due diligence.

5. Ms. Isaacson's testimony and her supporting exhibits took Don and his counsel by surprise. On or about September 30, 2008, David Drake personally met with Gary Searle in Tooele, Utah and asked him whether he had any exhibits he would submit during the remand hearing. Mr. Searle told Mr. Drake that the State would not be offering any exhibits into evidence at the remand

hearing. Consequently, the testimony of Tara Isaacson, based upon the exhibits she prepared and which the State attempted to place into evidence, took unfair advantage of Don and his counsel. Moreover, the fact that Tara Isaacson testified the way she did regarding these suspect exhibits mandates that the record be supplemented to correct this disadvantage.

6. Since the purpose of the remand hearing is to supplement the record with facts not actually appearing in the original record and based upon the truth-seeking objective of this Court, the remand record should be supplemented by Exhibits A and B.

Therefore, it is respectfully requested that Don be able to supplement the record with David Drake's September 22, 2006 letter (Exhibit A) and with Zions Bank statement (Exhibit B).

DATED October 16, 2008.

DAVID DRAKE, P.C.
Attorney for Appellant/Defendant

David Drake

GM

VERIFICATION

STATE OF UTAH)
: ss
County of Salt Lake)

David Drake, being first duly sworn upon oath, states that he has read the foregoing Memorandum in Support of Motion to Supplement Remand Hearing Record, that he has personal knowledge of the statements made in said memorandum, and that the statements made in said memorandum are true according to his personal knowledge, information, and belief.

DATED October 16, 2008.

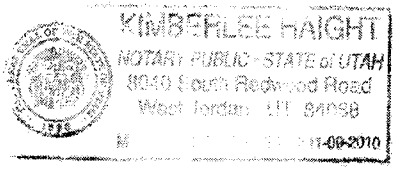
David Drake

SUBSCRIBED AND SWORN TO before me this 16th day of October, 2008.

Notary Public

My Commission Expires:

11-09-10



GNL

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on October 16, 2008 a true and correct copy of the foregoing memorandum in support of motion to supplement remand hearing record was served by facsimile and mailed, first class postage prepaid, to the following:

Gary K. Searle, Esq.
Deputy Tooele County Attorney
47 South 100 East
Tooele, UT 84074
(Fax: 435/843-3127)

with the original mailed to:

Clerk, 3d District Court
74 South 100 East, Suite 14
Tooele, UT 84074

By: _____

Exhibit "A"

COPY

LAW OFFICE OF DAVID DRAKE, P.C.
6905 South 1300 East, #248
Midvale, Utah 84047

***Phone*: (801) 205-9049** ***Facsimile*: (801) 233-3575**
***Email*:kingdrake@msn.com**

September 22, 2006

Tara L. Isaacson, Esq.
BUGDEN & ISAACSON, LLC
623 East 2100 South
Salt Lake City, UT 84106

RE: Your September 7, 2006 statement to Duane Millard

Dear Tara:

I received a copy of your September 7, 2006 statement from Duane Millard. Needless to say, the amount of your statement was disconcerting since some of your billing entries are subject to question. I can understand the amount of time in your first entry to review the files for appeal in order to identify documents for me to organize and index. However, your billing entry implies I did not receive the whole file, only an edited version. Since I am doing the appeal for Don Millard and as I requested from you during our initial conversation, I wanted copies of your ***whole*** file, not the documents you deem are necessary for the appeal. It is necessary that I receive all documents in order to frame the issues I deem are relevant to the appeal. Have I received your ***whole*** file? Please fax me the answer to this inquiry as soon as possible. (I do thank you for your cooperation to date.)

Your second entry indicates you billed 2.25 hours to finalize your short letter to me and prepare an index. The preparation of an index appears to duplicate the first entry. Moreover, it would have been a simple and less expensive matter to just photocopy your whole file and provide me with it, not an edited version. The Rules of Professional Conduct mandate that I receive the whole file.

Your third entry states that we had a .75 hour phone conversation. As I recall, our conversation lasted approximately .5 hours. Be that as it may and based upon the foregoing, Mr. Millard proposes an offer and compromise since he is contesting the $1,012.50. Enclosed herewith is his check in the amount of $506.25 as payment in full of your September 7, 2006 statement. Endorsement of this check constitutes an agreement that the payment of $506.25 is a full settlement and compromise of the amount you claim is owed by Mr. Millard as indicated by your September 7, 2006 statement.

If you have any questions or comments, please call me at 801/205-9049.

Cordially,

/s/
David Drake
DD/la

cc: Duane Millard

Exhibit "B"

David Drake
Utah State Bar # 0911
6905 South 1300 East #248
Midvale, UT 84047
Telephone: (801) 205-9049
Facsimile: (801) 233-3575

Peter W. Guyon
Utah State Bar # 1285
614 Newhouse Building
10 Exchange Place
Salt Lake City, UT 84111
Telephone: (801) 322-5555
Facsimile: (801) 322-5558

IN THE THIRD DISTRICT COURT OF THE STATE OF UTAH
TOOELE DEPARTMENT, COUNTY OF TOOELE

---ooo0ooo---

THE STATE OF UTAH,	:	**ORDER ON MOTION TO SUPPLEMENT REMAND HEARING RECORD**
Plaintiff/Appellee,	:	
-vs-	:	Appellate Case no. 20060336-SC
DONALD MILLARD,	:	Trial Court Case No. 041300401
Defendant/Appellant.	:	Judge Mark S. Kouris

---ooo0ooo---

Based upon defendant/appellant's Motion to Supplement Remand Hearing Record and good cause appearing,

IT IS HEREBY ORDERED that defendant/appellant's motion be and is hereby granted and that the remand hearing record in the above-captioned matter be and is hereby supplemented to

include a copy of the letter from David Drake to Tara Isaacson dated September 22, 2006 which is attached to this Order, incorporated hereat, and becomes part of this Order, and a copy of the Zions Bank statement showing that a check made payable to Bugden and Isaacson in the amount of $506.25 and was negotiated by the aforementioned payee indicating receipt of those funds by Bugden and Isaacson, which is also attached to this Order, incorporated hereat, and becomes part of this Order, the result of which supplements the remand hearing record.

DATED this 10 day of ~~October, 2008.~~ November 2007

BY THE COURT:

HONORABLE MARK S. KOURIS
Third District Court Judge

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on October 17, 2008 a true and correct copy of the foregoing order on motion to supplement the remand hearing record was served by facsimile and mailed, first class postage prepaid, to the following:

Gary K. Searle, Esq.
Deputy Tooele County Attorney
47 South 100 East
Tooele, UT 84074
(Fax: 435/843-3127)

with the original mailed to:

Clerk, 3d District Court
74 South 100 East, Suite 14
Tooele, UT 84074

By: David Drake

Exhibit "A"

LAW OFFICE OF DAVID DRAKE, P.C.
6905 South 1300 East, #248
Midvale, Utah 84047

Phone: (801) 205-9049

Facsimile: (801) 233-3575
Email: kingdrake@msn.com

September 22, 2006

Tara L. Isaacson, Esq.
BUGDEN & ISAACSON, LLC
623 East 2100 South
Salt Lake City, UT 84106

RE: Your September 7, 2006 statement to Duane Millard

Dear Tara:

I received a copy of your September 7, 2006 statement from Duane Millard. Needless to say, the amount of your statement was disconcerting since some of your billing entries are subject to question. I can understand the amount of time in your first entry to review the files for appeal in order to identify documents for me to organize and index. However, your billing entry implies I did not receive the whole file, only an edited version. Since I am doing the appeal for Don Millard and as I requested from you during our initial conversation, I wanted copies of your *whole* file, not the documents you deem are necessary for the appeal. It is necessary that I receive all documents in order to frame the issues I deem are relevant to the appeal. Have I received your *whole* file? Please fax me the answer to this inquiry as soon as possible. (I do thank you for your cooperation to date.)

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If you have any questions or comments, please call me at 801/205-9049.

Cordially,

/s/
David Drake
DD/la

cc: Duane Millard

Exhibit "B"

10 CHECKS PROCESSED

Number	Date	Amount	Number	Date	Amount	Number	Date	Amount
1953	11/01	506.25	1963	10/23	20,700.56	1973*	10/30	2,100.00
1957*	10/16	115.00	1964	10/19	40.80	1974	11/06	52.27
1961*	10/13	1,637.96	1968*	10/25	23.44	1977*	11/09	65.27
1962	10/19	1,325.00						

** Not in check sequence*

DAILY BALANCES

Date	Amount	Date	Amount	Date	Amount
10/13	2,410.59	10/25	21,772.91	11/03	10,916.45
10/16	2,295.59	10/27	20,772.91	11/06	10,864.18
10/17	4,608.12	10/30	8,446.70	11/07	13,176.71
10/18	31,608.12	10/31	8,386.70	11/08	10,785.14
10/19	30,242.32	11/01	7,880.45	11/09	10,719.87
10/23	9,541.76	11/02	11,916.45	11/10	9,725.89
10/24	9,489.99				

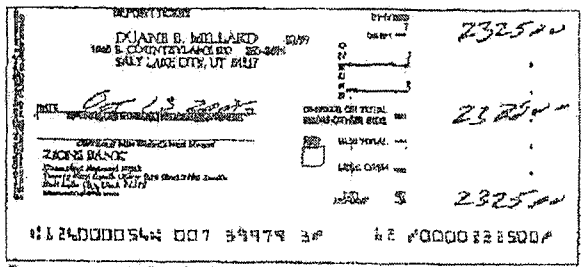
INTEREST

Interest Earned This Interest Period	$6.02	Number Of Days This Interest Period	29
Interest Paid Year-To-Date 2006	$60.11	Annual Percentage Yield Earned	0.64%

Current interest rate is 0.50%

Interest rate changes this interest period:

Date	New Interest Rate
10/18	0.75%
10/23	0.50%
10/25	0.75%
10/30	0.50%



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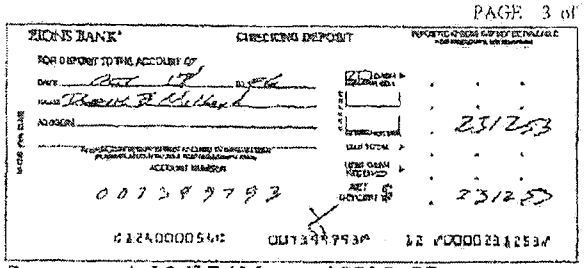

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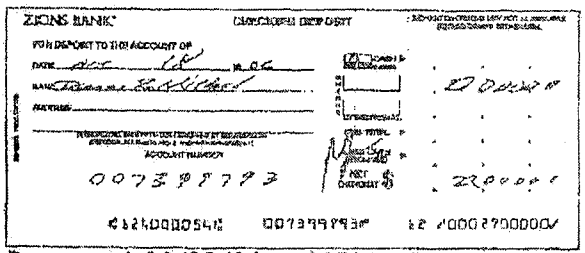

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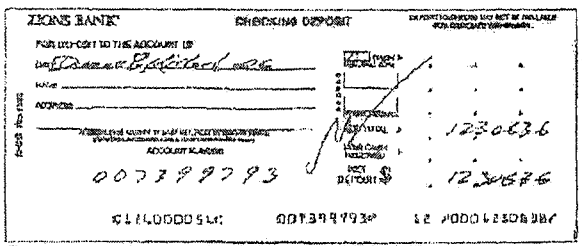

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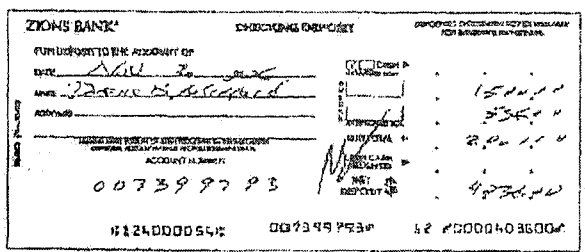

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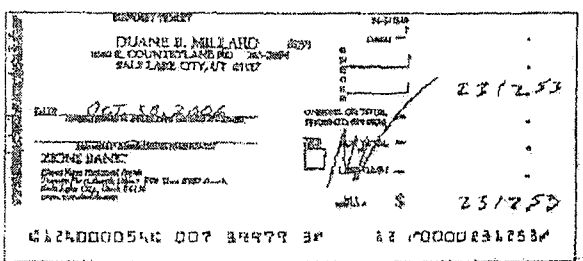

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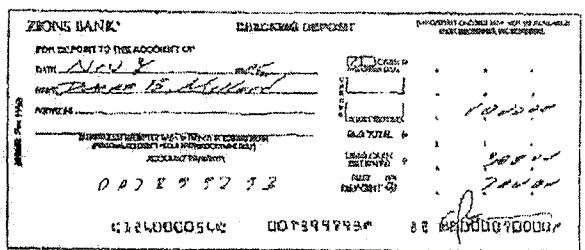

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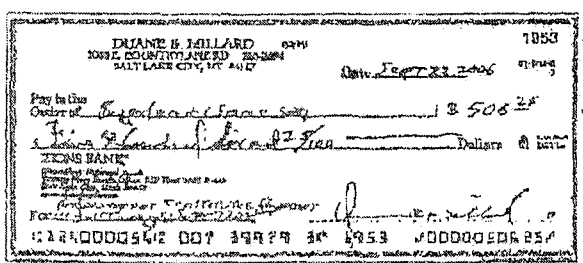

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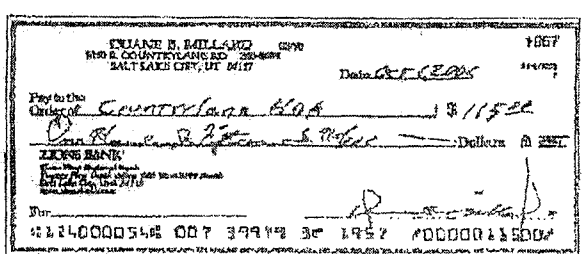

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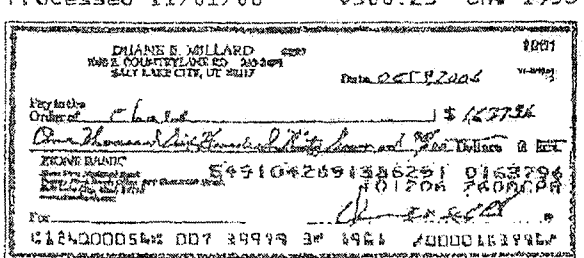

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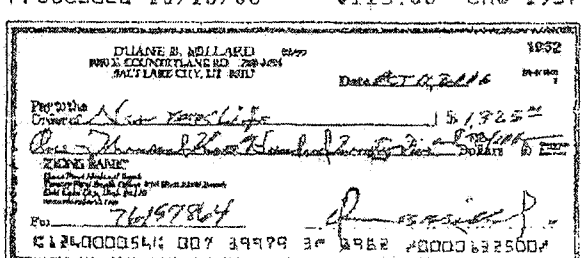

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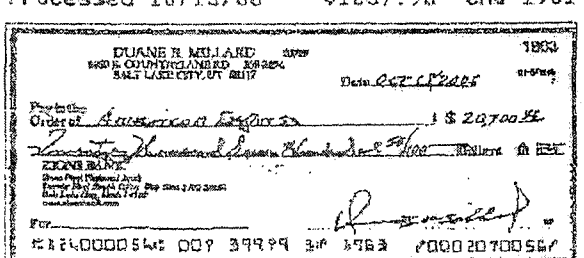

Processed 10/23/06 $20700.56 Ch# 1963

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the ___ day of April, 2010, a true and correct copy of the above Addenda to Reply Brief of Appellant was hand-delivered to the following counsel of record:

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